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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
PETITIONER,

vs.

ENTERPRISE WHEEL AND CAR CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1959
CERTIORARI GRANTED JANUARY 11, 1960

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION, a corporation, Defendant Below, Appellant,

v.

UNITED STEELWORKERS OF AMERICA, Plaintiff Below, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX TO BRIEF OF APPELLANT

JUDGMENT OF THE DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STEELWORKERS OF AMERICA,
Plaintiff,

v.

CIVIL ACTION
FILE NO. 895

ENTERPRISE WHEEL AND CAR CORPORATION,
Defendant.

ORDER

By Order of December 11, 1958, this matter having been submitted for decision on the proceedings had herein for Defendant to show cause, and the Court having taken time to consider same, the Court is of the opinion and so finds that Defendant has not shown good cause for its non-compliance with the "Decision and Award of Arbitrator, Milton H. Schmidt," issued upon the arbitration proceedings had between the parties pursuant to the Order of this Court entered October 21, 1957, and which decision and award was annexed as an exhibit to Plaintiff's motion to show cause filed herein; and it is accordingly:

ADJUDGED, ORDERED and DECREED, that the Defendant, Enterprise Wheel and Car Corporation, forthwith comply with the "Decision and Award of Arbitrator, Milton H. Schmidt," issued April 10, 1958, upon the arbitration proceedings had between Plaintiff and Defendant, and in accordance therewith forthwith offer to reinstate, and reinstate each of the grievants involved in said arbitration, namely, William J. Slone, Richard G. Campbell, Fenton Waugh, Everett Freeman, Richard Danford, Everett Perdue, Fred E. Crabtree, Leo Insco, Jr., Ira Noble, Dallas Dalton and Harry Carter, who desire reinstatement to the status of employees with their classification and seniority status as of the date of their discharge on January 18, 1957; and forthwith reimburse said grievants for all time actually lost from work which they would otherwise have had from the Defendant at the regular rate of pay for each grievant, less the ten day suspension period noted in said award, and less such amounts as each has received for other employment since ten days after January 18, 1957; to all of which action of the Court the Defendant objected.

Enter this 16th day of December, 1958.

/s/ HARRY E. WATKINS
United States District Judge

OPINION OF THE DISTRICT COURT

HARRY E. WATKINS, District Judge.

This is an action brought under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. §185, commonly known as the Taft-Hartley Act, regarding a grievance arbitration provision in a collective bargaining agreement which was in effect between the plaintiff union and defendant employer from April 5, 1956, to midnight April 4, 1957. On October 21, 1957, after a full hearing, this Court granted plaintiff's motion for summary judgment and ordered the defendant, pursuant to the terms of the agreement, to submit to arbitration a grievance involving the discharge of eleven employees on January 18, 1957. After the entry of that order, the grievance involved here was submitted by the parties to an umpire or arbitrator, who held hearings and rendered a "Decision and Award." That award, dated April 10, 1958, requires defendant to reinstate the aggrieved employees to their position of January 18, 1957, and further awards reimbursement of wages for all time lost because of their wrongful discharge, with the exception of a 10-day suspension period, less such amounts received for other employment since 10 days after January 18, 1957. Defendant has refused to abide by the award and, in this same action, upon the motion of the plaintiff, the Court has ordered defendant to show cause why it has not complied with the arbitrator's decision. Defendant has filed an answer setting forth its position, and after the filing of extensive briefs and oral argument, the matter has been submitted for decision.

Defendant urges first that this Court is without jurisdiction to act upon plaintiff's motion to show cause, now that the arbitrator has rendered his decision, because the motion seeks to enforce an award which defendant reads as being uniquely personal to the individual grievants, under the rationale of Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 1955, 348 U.S. 437, 75 S. Ct. 488, 99 L. Ed. 510. That case did not involve an arbitration provision, but held that a union had no standing to initiate an action in federal court for unpaid wages allegedly due under the provisions of a collective-bargaining contract to some 4,000 employees represented by the union. In three separate opinions, the majority of the Supreme Court held that §301 of the Taft-Hartley Act does not authorize suits by unions for uniquely personal rights of the individual employees such as compensation.

The decision of this Court leading to the entry of the order of October 21, 1957, compelling arbitration, was based on three Supreme Court decisions handed down in June, 1957. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S. Ct. 923, 1 L. Ed. 2d 972; General Electric Company v. Local 205, United Electrical, Radio and Machine Workers of America, 353 U.S. 545, 77 S. Ct. 921, 1 L. Ed. 2d 1028; and Goodall-Sanford, Inc. v. United Textile Workers of America, 353 U.S. 550, 77 S. Ct. 920, 1 L. Ed. 2d 1031. Those cases held that United States District Courts are given jurisdiction by §301 of the Taft-Hartley Act to decree specific performance of an agreement to arbitrate all grievances, when that agreement is contained in a collective-bargaining con-

tract. Plaintiff urges here that it is manifestly a part of this Court's power, under those cases, to require acquiescence in the decision of the arbitrator, once the Court has ordered a party to such a collective-bargaining agreement to submit a grievance to arbitration.

Defendant points to one case from a district court which held that notwithstanding the Lincoln Mills, General Electric, and Goodall-Sanford cases of 1957, the Westinghouse case of 1955 prevents a union from bringing an action in district court to enforce an arbitrator's award. Textile Workers Union of America v. Cone Mills Corp., October 17, 1958, D.C.M.D.N.C., ...F. Supp....., 27 L.W. 2196. But defendant admits that there is a split of authority on this point, for the case of Amalgamated Clothing Workers of America v. A. L. Kornman Co., December 17, 1957, D.C.M.D. Tenn., ... F. Supp....., 33 CCH Labor Cases, par. 71,166, held that a district court has jurisdiction under §301 of the Taft-Hartley Act to enforce an arbitrator's award, despite the holding of the Westinghouse case, under the authority of the Lincoln Mills and companion decisions. These district court cases, Cone Mills and Kornman, are not in point here, however, because in both instances the parties had voluntarily submitted the grievance to arbitration (apparently in accordance with provisions of collective-bargaining contracts) before any action was brought in the district court. In the case at bar, on the other hand, there was no voluntary submission of a grievance to arbitration, but rather defendant only submitted the problem to arbitration after an order of this Court required it to do so.

It may well be that once an arbitration award has been made pursuant to a voluntary submission by the parties to arbitration which finally determines the rights of the parties to a grievance, particularly in situations like that in the Cone Mills case, supra, where the award concerned itself only with wages due individuals in the form of vacation payments or unemployment benefits, the union has no standing to sue, but rather the affected individuals must press their personal claims. I do not need to decide that question here, for that is not our case, although it is interesting to note that here the case is being prosecuted by the union primarily to obtain reinstatement of the workers with the monetary award a secondary consideration, and since at the time this grievance began the plaintiff union was the exclusive bargaining agent of the affected employees, the plaintiff might have enough interest in the action to bring suit even if the arbitration award were the result of voluntary submission to arbitration.

But it must be kept in mind that this action was originally brought to compel defendant to submit the grievance to arbitration, and this Court ordered the defendant to

> "within 35 days from the date hereof, commence specific performance of Step Four of Article III of the agreement between Enterprise Wheel and Car Corporation and the United Steelworkers of America, dated April 4, 1956, and to expeditiously proceed with the procedure therein set forth, * * * ."

Having partially complied with that order, it is too late for defendant to now urge that this Court has

no jurisdiction to compel defendant to go through with arbitration. It would certainly be unfair to allow a party to go step by step through the process of arbitration, only to ignore the decision when it turns out unfavorable to that party.

As quoted above, this Court ordered defendant to proceed with the arbitration procedure of Step Four of Article III. Defendant complied with (or the parties waived) all the provisions of Step Four except the vital last sentence, which reads: "The decision of the umpire shall be final and binding on the parties." I conclude that it was inherently a part of the order of October 21, 1957, that defendant accept as final and binding the decision of the umpire, or arbitrator. To hold otherwise would have the order requiring a futile act. As stated in the recent case of Item Company v. New Orleans Newspaper Guild, 5 Cir., 256 F. 2d 855, 856, decided June 26, 1958, the Supreme Court recognized in the Lincoln Mills and companion cases that §301 of the Taft-Hartley Act created a new area of federal substantive law and "* * * declared that in this new field of law, rules are to be devised by the federal courts to determine enforceability of collective-bargaining-contract clauses for arbitration of disputes arising 'between an employer and a labor organization'." In arriving at the rules to be applied by the courts in this regard, certainly Congress did not intend that federal courts should have the power to require employers and unions to submit their differences to arbitration, but those same courts should have no power to see that the parties accept the arbitrator's decision. The Lincoln Mills case found a Congressional policy favoring the peaceful settlement of labor disputes by

the use of arbitration, and I think it completely consonant with that policy to hold that once this Court has compelled arbitration the Court has power to see that its order is fully carried out.

I therefore reject defendant's contention that this Court is without jurisdiction because personal rights of individuals are affected. This Court had jurisdiction, under §301 as interpreted by the Lincoln Mills case, of this action when it originated because a union controversy was involved. The union and the employer were the only parties to the collective-bargaining contract which this Court ordered specifically performed with regard to arbitration. The arbitrator's award is entitled, "In the Matter of Arbitration Between Enterprise Wheel and Car Corporation and United Steelworkers of America, AFL-CIO, Local Union No. 4513." Defendant has not carried out all the acts required of it by the order of October 21, 1957. I think it is quite clear, under all the circumstances, that this Court continues to have jurisdiction of this controversy between the union and the employer.

Defendant's second jurisdictional defense is equally groundless. It is contended that the order of October 21, 1957, has been compiled with and the case has been finally concluded. But as discussed previously, the only fair interpretation which can be placed upon the order is that it requires defendant to proceed through *all* the process of arbitration as set forth in Step Four of the contract, including acceptance of the arbitrator's award.

That does not mean that the arbitrator must necessarily have gone through the accounting process

of computing precisely how much back pay each aggrieved employee is entitled to receive, or how much must be deducted by reason of wages earned elsewhere during the period these employees were wrongfully deprived of employment. A good faith compliance with the award by both parties eliminates the necessity of the arbitrator considering such petty, ministerial computations. The award requires the defendant to reimburse certain employees for

> "all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957."

The award is quite specific, and I find no merit in defendant's argument that it is so incomplete or imperfect that it does not constitute a final and definite award.

Defendant strongly urges that the arbitrator exceeded his authority in this case when he ordered reinstatement and back pay to the eleven grievants extending past April 4, 1957, which was the termination date of the contract. Defendant cites authorities such as Williston on Contracts (1937 ed.) Sec. 1359, p. 3815; United Protective Workers Local No. 2 v. Ford Motor Co., 7 Cir., 223 F. 2d 49; O'Dell v. Humble Oil & Refining Co., 10 Cir., 201 F. 2d 123, and several older cases, for the proposition that damages for wrongful discharge under a collective-bargaining contract are limited to the period with the earliest date on which the employee could lawfully be discharged.

Defendant reasons that on the day this contract expired, the defendant could have discharged these employees and not be subjected to damages for the discharge, and that, therefore, no award can properly be made granting back pay or reinstatement past that date when defendant could lawfully have discharged these workers. An investigation of all the cases cited, however, reveals that in each of them the discharged employees accepted the termination of their employment and sued for damages for the wrongful discharge without seeking reinstatement.

In the case at bar, if any or all of the eleven employees would have accepted their discharge as final and chosen to sue their employer for wrongful discharge, then these cases cited by the defendant might apply and if the discharge were found to be wrongful the employee would be limited in his measure of damages to back pay from the date of discharge to the expiration date of the contract. In this instance, however, the eleven employees have not accepted their discharge as final, but the union has used the grievance-arbitration mechanism of the collective-bargaining contract to gain reinstatement of the wrongfully-discharged employees. The Court is informed that the men involved here are somewhat elderly men, to whom seniority is of utmost importance and to whom back wages are only a comparatively incidental factor. The reinstatement is the moving factor of the union's interest and right in this case.

To allow the defendant to only reimburse the employees up until April 4, 1957, would be to allow the defendant to profit unfairly from its own wrongdoing.

If the men had not been unjustly discharged, it must be assumed that their employment would have continued to date; until reinstated, these employees continue to suffer loss of wages by virtue of the defendant's improper action irrespective of any expiration of the contract. This same point was raised in Western Union Division, Commercial Telegraphers Union v. Western Union Telegraph Co., 83 N.L.R.B. Reports 238, where the employer was prohibited by Sec. 222 (f) (7) of the Merger Act (Communications Act of 1934, as amended) from furloughing employees within four years of its merger with Postal Telegraph. The company furloughed an employee within the four-year period, illegally. The full National Labor Relations Board ordered reinstatement and back pay for the employee, even though the four years had passed by the time the Board handed down its decision. The Board stated:

> "In this case, Hepp's loss, after the 4-year period, of the job held by him before his furlough, with the consequent loss of wages, is a direct result of the Respondent's wrongful conduct, unless it be assumed that the Respondent would have furloughed him immediately upon the expiration of that period. Such an assumption would be wholly speculative on the present record and is one, therefore, in which we are unwilling to indulge.
>
> "Under these circumstances, we conclude that the remedy recommended by the Trial Examiner, *viz.*, reinstatement and back pay until reinstatement is offered, is appropriate * * * "

And in Victor Metal Products Corp. of Delaware, 106 N.L.R.B. Reports 1361, an employee was found to have been unlawfully discharged by her employer on January 23, 1953. The union's contract expired March 15, 1953, and the employee was reinstated May 4, 1953. The Board found that the union had caused the wrongful discharge, and ordered back pay to be assessed against the union. The union contended it was not liable for any back pay after the expiration of its contract, but the Board held:

> "The purpose of the Board's remedial orders is not punitive, but to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination.' As a result of the Respondent Union's unlawful conduct, Bedima [the employee] suffered a loss of wages from January 23, 1953 to May 4, 1953. The Trial Examiner's recommended order merely requires the Union to make her whole for this loss—in other words, to restore Bidema to the situation which would have obtained but for the illegal discrimination practiced against her.
>
> "It is true that the Union's collective-bargaining contract with the Employer ended on March 15, 1953. But this did not alter the fact that the Union had unlawfully caused the Employer to discharge Bidema and that the loss of wages suffered by her from March 15 to May 4 resulted from that unlawful act. * * * As between the victim of the unlawful conduct and the wrongdoer, we believe that the loss suffered by the former should equitably be borne by the latter."

If defendant here had utilized the grievance machinery contained in the collective-bargaining agreement,

without undue delay occasioned by its refusal to arbitrate and its refusal to accept the arbitrator's decision, these employees could probably have been reinstated before the contract expired. The protagonist in the delay in settling the dispute of January 18, 1957, has been the defendant, who cannot now complain of the nearly 23 months of back pay awarded the employees who were improperly discharged. I find that the arbitrator did not exceed his authority under the contract in this case.

I conclude that this Court has jurisdiction over this matter, under §301 of the Taft-Hartley Act; that the plaintiff union has a standing in this Court to see that the arbitration agreement to which it is a party is carried to fruition; and the Court having once taken jurisdiction should dispose of all questions arising in the case, particularly since to dismiss this action would result either in a multiplicity of suits by individual employees or a failure of justice altogether. The Lincoln Mills case establishes that the substantive law in cases of this type is to be fashioned by federal courts from the policy of our national labor laws, and "The range of judicial inventiveness will be determined by the nature of the problem." 353 U. S. at page 457. It would appear that requiring the defendant here to comply with the arbitrator's findings appropriately and logically follows the teaching of the Lincoln Mills case. The arbitrator's decision requiring defendant to reinstate employees and reimburse them for back pay past the termination date of the contract is in keeping with the policy of our labor laws under the National Labor Relations Board cases cited earlier. It is therefore the ruling of this Court that defendant

corporation must promptly abide by the valid, complete and binding decision and award made by the arbitrator; that this is a part of the specific performance ordered by this Court on October 21, 1957; and that plaintiff is now entitled to further relief in this case in the form of an additional order specifically compelling defendant to forthwith accept and abide by the final decision and award of the arbitrator.

Counsel may prepare an appropriate order in accordance with the views expressed in this opinion.

ORDER ENTERED OCTOBER 21, 1957 COMPELLING SUBMISSION TO ARBITRATION

On the 15th and 16th days of October, 1957, came the plaintiff by James P. Clowes and Carney M. Layne, its counsel, and came the defendant by E. A. Marshall, its counsel, and this cause came on for hearing on plaintiff's motion for summary judgment with affidavit attached, at the commencement of which hearing defendant tendered in open Court the affidavit of E. A. Marshall, which is ordered filed, and thereupon plaintiff tendered the affidavit of Harold Johnson which is likewise ordered filed; whereupon the matter was argued by counsel, and the Court having considered the motion, the pleadings and both plaintiff's and defendant's affidavits on file, and being fully advised in the premises, it is of opinion that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law, and it is:

ADJUDGED, ORDERED, and DECREED that plaintiff's motion for summary judgment be, and the same is, hereby sustained, and that costs be assessed against the defendant, and that the defendant, Enterprise Wheel and Car Corporation, within 35 days from the date hereof, commence specific performance of Step Four of Article III of the agreement between Enterprise Wheel and Car Corporation and the United Steelworkers of America, dated April 4, 1956, and to expeditiously proceed with the procedure therein set forth, to which action by the Court the defendant objected and excepted.

/s/ HARRY E. WATKINS
United States District Judge

EXCERPTS FROM THE COLLECTIVE BARGAINING AGREEMENT BETWEEN ENTERPRISE AND THE UNION DATED APRIL 5, 1946 [Exhibit A to the Complaint]

ARTICLE III. *Adjustment of Grievances:*

Section 1. Should differences arise between the Company and the Union, or its members employed by the Company as to the meaning and application of the provisions of this Agreement, an earnest effort shall be made to settle such differences immediately, in the following manner:

* * *

Step 4. In the event that the dispute shall not have been satisfactorily settled in accordance with the above, it shall be submitted, at the request of either party, to a panel of three (3) members, one of whom shall be appointed by the Union, one by the Company and the third member, who shall be an impartial umpire, shall be selected by mutual agreement of the parties. The expenses and salary incident to the services of the umpire shall be paid jointly by the Union and the Company. In the event that a mutually agreeable umpire cannot be selected within ten (10) days after date of notice of desire to appeal to 4th step grievance, either party may request the Federal Mediation and Conciliation Service to furnish the Company and the Union with a list of five (5) qualified and disinterested arbiters. The Company and the Union shall each reject two of the names thus submitted and the remaining person (or either

of the remaining persons) shall be the third member of the panel. The decision of the umpire shall be final and binding on the parties.

* * *

ARTICLE IV. *Suspension and Discharge:*

Section 1. In the exercise of its rights and duties as set forth in ARTICLE VIII, Management agrees that a member of the Union shall not be peremptorily discharged from and after the date hereof, but that in all instances in which Management may conclude that an employee's conduct, may justify suspension or discharge, he shall be first suspended. Such initial suspension shall be for not more than five (5) work days. During this period of initial suspension the employee may, if he believes he has been unjustly dealt with, request a hearing and a statement of the offense before the Plant Manager with a member or members of the Grievance Committee present as he may choose. At such hearing, all the facts concerning the case shall be made available to both parties. After such hearing, Management shall conclude whether to convert the suspension into discharge, or extend, sustain, or revoke the suspension. If the suspension is revoked the employee shall be returned to employment and receive full compensation at his regular rate of pay for the time lost. If the suspension is sustained, extended, or converted into discharge, the employee may at any time within five (5) working days from the filing of Management's decision, allege and present a grievance to be handled in accordance with the procedure of ARTICLE III.

Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost.

* * *

ARTICLE XV. *Duration and Renewal:*

Section 1. The Company and the Union mutually agree that the terms and conditions of this Agreement shall be in full force and effect from April 5, 1956 until Midnight on April 4, 1957.

AWARD OF THE ARBITRATOR, FROM EXHIBIT A OF PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE

The grievance is allowed as follows:

1. The discharge of each of the grievants which occurred on January 18, 1957, is set aside and reduced to a disciplinary penalty of ten days suspension for each of the grievants. The ten day period is to be calculated from January 18, 1957.

2. The Company shall reinstate each of the grievants who desire reinstatement to the status of employees with their classifications and seniority status as of the date of their discharge, January 18, 1957.

3. The Company shall reimburse the grievants for all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957.

/s/ Milton H. Schmidt

AFFIDAVIT OF OSCAR KRAHENBUEHL IN SUPPORT OF DEFENDANT'S ANSWER AND RESISTANCE TO PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE; ALSO TAKEN AND TREATED AS A PART OF THE ANSWER TO THE ORDER TO SHOW CAUSE.

STATE OF WEST VIRGINIA

COUNTY OF CABELL, TO-WIT:

This day personally appeared before me, the undersigned authority OSCAR KRAHENBUEHL who, being by me first duly sworn, deposes and says that he is President of Enterprise Wheel and Car Corporation, the defendant named in that certain motion to show cause filed by United Steel Workers of America, as plaintiff in the above captioned action; that he has been President of that corporation for approximately eight years; that said corporation entered into a contract on April 5, 1956 expiring on April 4, 1957, with the plaintiff Union; that said contract is the same contract under which the United States District Court for the Southern District of West Virginia by order of October 21, 1957 in the above captioned action ordered the corporation to comply with the arbitration procedure of Step 4, Article III therein; that in accordance with said court order said grievances ordered by the court to be arbitrated were submitted by the Union and the corporation to Milton H. Schmidt for arbitration under the terms and conditions of the contract aforesaid; that hearing was held before said arbitrator on January 3, 1958; that on April 10, 1958 the arbitrator rendered

what he called "Decision and Award of Arbitrator, Milton H. Schmidt"; that the corporation has not satisfied said award because it is illegal and void; that notwithstanding that the decision and award are void and would apparently grant reinstatement of the grievants involved with back pay at their regular rate, less amounts as received from other employment not only for ten days after January 28, 1957 (the date of the end of a ten-day suspension period imposed by the arbitrator) to April 4, 1957, but on into the future beyond the contract termination date; the corporation, nevertheless, while refusing reinstatement, offered to pay the grievants at their regular rate of pay for their actual losses from the end of the ten-day suspension period on January 28, 1957 to April 4, 1957, the contract termination date, but said offer was refused by the Union.

Affiant further says that since April 4, 1957, the contract termination date, the employees of the corporation have worked without, and are still working without, any contract or agreement whatsoever; that the terms of the terminated contract have not been extended beyond April 4, 1957, and no new collective bargaining contract has been negotiated.

/s/ OSCAR KRAEHENBUEHL

Taken, subscribed and sworn to before the undersigned authority this 8th day of December, 1958.

My commission expires July 19, 1961.

/s/ DORA SCHWEICKERT
Notary Public, Cabell County,
West Virginia

EXCERPTS FROM THE TRANSCRIPT OF DECEMBER 11, 1958

Colloquy between Court and Union Counsel

Page 15:

* * *

THE COURT: Now, don't tell me what I have already decided. I will decide what I have already decided, but I am thinking of this. It seems to me that your theory of the case is not based upon any oral agreement that was in effect or whether the men worked under any later oral agreement or not, and they are not basing—as I understand their contention—on any fact—admittedly there was no written agreement—you did not contend that this other agreement continued beyond April of 1957, as I understand you.

MR. CLOWES: No, sir, the old agreement did not.

Pages 32-34:

THE COURT: Let me ask you this, you take the position then that the company's way of getting out of this dilemma is to first reinstate him, the contract is ended, you don't contest the fact that the company could discharge him the day they reinstate him?

MR. CLOWES: No, sir, I do not.

THE COURT: Because there is no contract.

MR. CLOWES: I won't go to that extent. There is no written contract. If they would fire a man for something apart from this particular situation right here after they have reinstated, that is entirely a different matter unrelated to this in any way. They can't discriminate under National Labor Relations Act or cause any wrongful discharge.

THE COURT: Of course, that's a different proposition.

MR. CLOWES: Yes, sir, that's a different proposition.

THE COURT: But certainly the existing contract would have been terminated—I mean the written contract that they had before would certainly be ended and under the provisions of that contract he would have no right to continue, would he?

MR. CLOWES: If he didn't fall within the provision of a new contract the company would then have the right to hire, fire and do anything.

THE COURT: That is what I mean.

MR. CLOWES: Yes, sir.

* * *

IN THE

United States Court of Appeals

for the Fourth Circuit

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION,
a corporation,
Defendant Below, Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
Plaintiff Below, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX TO BRIEF OF APPELLEE

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IN THE

United States Court of Appeals

for the Fourth Circuit

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION,
a corporation,
Defendant Below, Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
Plaintiff Below, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX TO BRIEF OF APPELLEE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STEELWORKERS OF AMERICA,
Plaintiff,
vs.
ENTERPRISE WHEEL AND CAR CORPORATION,
Defendant.
Civil Action
File No. 895

COMPLAINT

1. Plaintiff is a labor organization representing employees in an industry affecting commerce as defined in 29 United States Code, and defendant is a corporation incorporated

under the laws of the State of West Virginia having a plant of operation at 909 Camden Road, Huntington, West Virginia, and employing members of plaintiff's labor organization, and this action arises under Section 301, Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Sec. 185, as hereinafter more fully appears.

2. On or about April 5, 1956, plaintiff and defendant entered into an agreement in writing, which agreement set forth therein the basic agreements covering rates of pay, hours of work, and working conditions of employment to be observed between the parties, a copy of which is hereto annexed as Exhibit A.

3. In accordance with the provisions of ARTICLE III, ADJUSTMENT OF GRIEVANCES, of said agreement, plaintiff and defendant agreed to settle differences arising between the defendant and the plaintiff, or its members employed by the defendant, as to the meaning and application of the provisions of said agreement, according to a specific procedure, including as the final step in the event the dispute be not satisfactorily settled in accordance with said procedure, submission of the grievance to arbitration.

4. That on or about January 17, 1957, a certain grievance arose between the plaintiff and defendant relating to the discharge of William J. Slone, et als, being employees of defendant and members of the plaintiff labor organization.

5. Pursuant to said agreement, Steps 1, 2, and 3 therein contained were accomplished by the plaintiff and defendant; that the plaintiff in accordanec with the procedure of Step 4 requested of the defendant in writing by letter dated February 17, 1957, arbitration of the grievance which arbitration was by the defendant refused; that subsequently defendant agreed to arbitrate and plaintiff and defendant selected as impartial umpire one Milton H. Schmidt, Atlas Bank Building, Cincinnati 2, Ohio, and the arbitration set for hearing on April 16, 1957, at defendant's office in Huntington, West Virginia.

6. Subsequently, defendant, by letter dated April 6, 1957, advised plaintiff that defendant refused to arbitrate, and although requested by the plaintiff on several occasions thereafter, defendant continued to refuse, and still refuses plaintiff's requests to arbitrate said grievance according to the provisions of its written agreement.

Wherefore plaintiff demands that defendant be required specifically to perform said agreement, particularly that provision known as ARTICLE III, ADJUSTMENT OF GRIEVANCES, that defendant be required specifically to arbitrate in accordance therewith, and plaintiff have judgment against defendant for costs.

JAMES P. CLOWES
Attorney for Plaintiff
207 Riley Law Building
Wheeling, West Virginia

CARNEY M. LAYNE
Attorney for Plaintiff
Inland Mutual Insurance Building
1017 Sixth Avenue
Huntington, West Virginia

PLAINTIFF'S EXHIBIT A

AGREEMENT

Between

ENTERPRISE WHEEL AND CAR CORPORATION

and the

UNITED STEELWORKERS OF AMERICA

AFL-CIO

PREAMBLE

PARTIES TO AGREEMENT

THIS AGREEMENT, made this 5th day of April, 1956 between the ENTERPRISE WHEEL AND CAR CORPORATION (hereinafter called the "Company") for its

plant located at Huntington, West Virginia (hereinafter called the "Plant") and the UNITED STEELWORKERS OF AMERICA (hereinafter called the "Union").

ARTICLE I. PURPOSE OF THE AGREEMENT

Section 1. It is the intent and purpose of the parties hereto that this Agreement shall promote and improve industrial, labor and economic relations between the Company and the Union; and to set forth herein the basic agreements covering rates of pay, hours of work and working conditions of employment to be observed between the parties.

Section 2. The term "employee" as used in this agreement shall include all production and maintenance workers including watchmen and janitors of the Company at its Huntington, W. Va. plant, and not elsewhere, except office and clerical employees, technical employees, professional employees, guards, and supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect change in the status of employees or effectively recommend such change.

ARTICLE II. RECOGNITION

Section 1. The Company recognizes the Union as the exclusive representative of all the employees of the Company, as defined in Article I—Section 2 hereof, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

* * * * * * *

ARTICLE III. ADJUSTMENT OF GRIEVANCES

Section 1. Should differences arise between the Company and the Union, or its members employed by the Company, as to the meaning and application of the provisions

of this Agreement, an earnest effort shall be made to settle such differences immediately, in the following manner:

Step 1. Between the employee, either with or without the Shop Steward, and the foreman. If no satisfactory disposition is made, then

(a) The grievance shall be put in writing, in triplicate, on forms furnished by the Union, and signed by the employee. Two (2) copies of the form will be given to the Company, one copy of which will be mailed by the company to the Union at its local address.

(b) Such written grievance shall, within thirty (30) calendar days after the occurrence of the grievance (provided the plant is working), be taken up by the Shop Steward, if requested by the Shop Steward, one member of the Plant Grievance Committee and the Plant Manager shall return his answer, in writing, within two (2) working days to the Shop Steward. If no satisfactory disposition is made, then

In case any grievance is carried beyond Step 2. (b), written minutes of all meetings held in connection with it shall be prepared in triplicate, two (2) copies of which will be retained by the Company, and one (1) copy delivered to the Union. These minutes shall be approved and signed by the parties hereto.

Step 2. Between the Plant Grievance Committee and the Plant Manager. If no satisfactory disposition is made within two (2) work days, then

Step 3. Between the representative of the National Organization of the Union and the President of the Company along with the Grievance Committee.

Step 4. In the event that the dispute shall not have been satisfactorily settled in accordance with the above, it shall be submitted, at the request of either party, to a panel of three (3) members, one of whom shall be appointed by

the Union, one by the Company, and the third member, who shall be an impartial umpire, shall be selected by mutual agreement of the parties. The expenses and salary incident to the services of the umpire shall be paid jointly by the Union and the Company. In the event that a mutually agreeable umpire cannot be selected within ten (10) days after date of notice of desire to appeal to 4th step grievance, either party may request the Federal Mediation and Conciliation Service to furnish the Company and the Union with a list of five (5) qualified and disinterested arbiters. The Company and the Union shall each reject two of the names thus submitted and the remaining person (or either of the remaining persons) shall be the third member of the panel. The decision of the umpire shall be final and binding on the parties.

Section 2. Upon request of the Union or the Company, the aggrieved employee, or employees, and the foreman involved will be called in during the meeting on Step 3 grievances.

Section 3. Meetings held in connection with Steps 2, 3, and 4, of Article III—Section 1, Adjustment of Grievances, shall be held after working hours on a date mutually agreed to by the parties.

Section 4. *Conferences called by the Company* with representatives of the Union shall be held during the regular working hours of such representatives, and such conferences shall not result in any loss of time to such representatives.

Section 5. The Company and the Union agree that they will cooperate fully in an effort to achieve maximum production. It is further agreed that the cooperation of all employees is necessary toward increased and improved productivity, toward the effective use of man power and equipment, and toward improved manufacturing methods, and consequently pledge their cooperation toward these objectives.

Section 6. It is understood and agreed that neither party will institute *civil suits or legal proceedings* against the other for alleged violation of any of the provisions of this labor contract; instead all disputes will be settled in the manner outlined in this Article III—Adjustment of Grievances.

ARTICLE IV. SUSPENSION AND DISCHARGE.

[see Appellant's Appendix, pp. 17-18]

* * * * * * *

ARTICLE V. REPRESENTATION

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ARTICLE VI. SENIORITY

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ARTICLE VII. WAGES

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ARTICLE VIII. MANAGEMENT

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ARTICLE IX. MILITARY SERVICE

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ARTICLE X. BONUS

* * * * * * *

ARTICLE XI. HOURS OF WORK AND OVERTIME

* * * * * * *

ARTICLE XII. SAFETY AND HEALTH

* * * * * * *

ARTICLE XIII. BULLETIN BOARD

* * * * * * *

ARTICLE XIV. GROUP INSURANCE

* * * * * * *

ARTICLE XV. DURATION AND RENEWAL

[see Appellant's Appendix p. 18]

ENTERPRISE WHEEL AND CAR CORPORATION
A. O. Kraehenbuhl
NEGOTIATING COMMITTEE
Local Union No. 4513
Pearl Skeems
Orlem Banks
UNITED STEELWORKERS OF AMERICA
David J. McDonald
Howard R. Hague
I. W. Abel
Paul Rusen
J. C. Carroll
Harold Johnson

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER

1. For answer to paragraph 1 of the plaintiff's bill of complaint the defendant admits that the plaintiff is a labor organization and that the defendant is a corporation incorporated under the laws of the State of West Virginia, having a place of operation at 909 Camden Road, Huntington, West Virginia, but has no knowledge whether it is employing members of the plaintiff's labor organization, nor has it made any inquiry to ascertain whether it is employing members of the plaintiff's labor organization.

2. Defendant admits the allegations contained in paragraph 2 of the plaintiff's bill of complaint and in further answer says that the contract entered into on April 5, 1956, expired at midnight, April 4, 1957; and further states that

since midnight, April 4, 1957, there has not been in existence a contract between the plaintiff and the defendant.

3. Defendant admits the allegations contained in paragraph 3 of the plaintiff's bill of complaint.

4. In answer to paragraph 4 of the plaintiff's bill of complaint the defendant denies that it discharged William J. Slone, et als, and for further explanation the defendant says that on or about January 17, 1957, the said William J. Slone, et als, went out on a wildcat strike in violation of the contract then existing between the plaintiff and the defendant, and that these men, in violation of the contract, quit their work during the work day, and the company refuses to reemploy them. This is the basis for the alleged grievances here involved. The defendant denies there ever existed a controversy between the plaintiff and the defendant as the plaintiff has, at all times, admitted said William J. Slone, et als, violated their contract by going out on a wildcat strike.

5. For answer to paragraph 5 of the plaintiff's bill of complaint the defendant denies that the steps provided for in the grievance procedure were followed except these alleged grievances were discussed between the complainants, and a representative of the plaintiff's national organization, and the president of the defendant company. The defendant admits receiving plaintiff's letter of February 17, 1957, and of refusing to arbitrate these alleged differences. Defendant further admits that subsequently it agreed to follow the grievance procedure provided for in the contract, and Milton H. Schmidt was selected as the arbitrator and the arbitration hearing was set for April 16, 1957, and that prior to the date set for hearing the arbitration proceedings, plaintiff failed to carry out an agreement it made with the defendant and for this reason the defendant refused to arbitrate these alleged grievances and for reason therefor, see the defendant's letter of April 6, 1957, to the plaintiff, copy of which letter is hereto annexed and made a part hereof at Exhibit A.

6. The defendant admits the allegation contained in paragraph 6 of the plaintiff's bill of complaint and for explanation thereto refers to paragraph 5 herein.

7. For further answer to said plaintiff's bill of complaint the defendant says that this Court is without jurisdiction to try the case, as the jurisdiction herein is vested with the National Labor Relations Board, and that on July 3, 1957, this plaintiff filed a charge against the defendant with the National Labor Relations Board, involving the matters in controversy here involved, copy of which charge is hereto annexed and made a part hereof as Exhibit B.

8. That the National Labor Relations Board, as a result of its investigation, refused to issue a complaint in this matter, as is disclosed by a copy of the National Labor Relations Board's decision of August 12, 1957, a copy of which is hereto annexed and made a part hereof, and marked as Exhibit C.

The defendant further says that the plaintiff has not exhausted its administrative remedies and that no request was filed for a review of the Board's decision of August 12, 1957.

9. The defendant further says that the questions before the Court are now moot. Had these alleged grievances been submitted to arbitration on the day the alleged grievances occurred, the decision of the arbitrator would be binding only during the life of the contract, which expired at midnight, April 4, 1957. Therefore, the question has now become moot.

ENTERPRISE WHEEL AND CAR CORPORATION

/s/ E. A. MARSHALL
of Counsel
Post Office Box 468
Huntington 8, West Virginia

FITZPATRICK, MARSHALL, HUDDLESTON & BOLEN
Counsel for Defendant

Defendant demands a jury trial.

ENTERPRISE WHEEL AND CAR CORPORATION

/s/ E. A. MARSHALL
of Counsel

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

Transcript of an excerpt from the proceedings held in re the above styled action in the United States District Court for the Southern District of West Virginia * * *

[Harry E. Watkins, District Judge:]

This is an action brought under Section 301 of the Labor Management Act, commonly known as the Taft-Hartley Act, in which the union—the Steelworkers Union—seeks to compel specific performance by the employer of a grievance arbitration provision in their collective bargaining agreement.

The contract between the union and the company was filed as an exhibit with the complaint, and when you look to that contract it shows that it covers a specific period beginning April 5, 1956 to midnight of April 4, 1957, and it contains also the common or conventional four-step procedure for resolving grievance disputes between the union on the one hand, representing the employees, and the company. By the terms of that agreement differences or grievances are to be settled by arbitration—let's say step number 4—they are to be settled by arbitration if they cannot be settled by the three lower steps, the three lower steps being agreement on the national level and agreement between the parties on the local level, and if they exhaust all of those and can't settle it, then upon the request of either side they must go to arbitration.

The complaint alleges that a dispute arose on January 17, 1957 relating to—as the complaint says—"to the discharge of some ten employees who were members of the union"—and it alleges that the employer has refused to arbitrate under the fourth step in resolving differences in the labor agreement.

The union does not ask for damages, but only prays that the employer be required by this court to arbitrate the grievance under the contract.

The pleadings, the exhibits, the affidavits, and what has been said here on the record in open court show that while this contract was in force and effect there was a dispute or a grievance relating to an employee by the name of Medley because of unauthorized absences. Certain members of the union's grievance committee took the matter up with the plant manager, and as a result of what happened ten men either quit work, as the defendant says—"went out on a wildcat strike"—or they were discharged as the plaintiff contends.

A grievance was filed in accordance with the collective bargaining contract and was processed through these first three lower steps, all without any success, let us say, or if they were not, if they didn't proceed under the three lower steps, the employer, the defendant, has admitted that procedure under these three lower steps was waived. That is brought out in a letter written by Mr. Marshall as counsel for the defendant to the union. The employer refused to arbitrate the matter according to Step 4 of the contract, and as a result this suit to require the employer to arbitrate under the provisions of the contract was instituted.

The employer's answer denies, first, that a difference or a grievance exists between these parties, but the affidavits which have been filed by both sides and what has been said here in open court clearly indicates that there is a difference, a dispute, existing as to whether these ten employees quit their job or whether they were unlawfully discharged. This

Court has no right to decide that matter; it has no jurisdiction to do so. It does, however, have the right to require specific performance providing there is a difference between the parties or grievances between the parties arising under this labor agreement between them.

That contract provides in Article 3, Section 1, as follows:

"Should differences arise between the company and the union or its members employed by the company as to the meaning and application of the provisions of this agreement, an earnest effort shall be made to settle such differences immediately in the following manner * *"—and then it goes ahead and sets forth the three steps of a preliminary nature, and then if they fail, upon the application of either side, at the request of either side, the matter shall go to arbitration. I think what they do—each side names an arbitrator, and if they cannot agree then they get the list on the third, they get names of five persons from a Mediation Board and each side strikes two, and the fifth, I believe, is the third arbitrator. Is that the procedure? I think it is. At any rate the fourth step in this matter of arbitration upon request of either side.

Article 4 specifically provides that the discharge of employees is a matter which is subject to this grievance procedure, so that the dispute here concerns one of these alleged differences or grievances under the labor contract.

The plaintiff union is recognized in Article 2 of the agreement to be the exclusive representative of all employees in the plant with certain exceptions which are not at all pertinent here.

The exhibits filed with the pleadings indicate that on July 3, 1957 the union filed with the National Labor Relations Board a charge complaining of an unfair labor practice under Section 8(a)(1), 8(a)(3), and 8(a)(5), of the Taft-Hartley Act alleging the employer had refused to bargain collectively with the union since April 6, 1957. The regional office of the National Labor Relations Board re-

fused by letter dated August 12, 1957 to issue a complaint in this case for the reason that in its opinion there was not sufficient evidence of violations to warrant further proceedings. The union admittedly did not seek a review of that decision as provided by the rules and regulations of the National Labor Relations Board, and the employer here, the defendant, now urges in this action that because of that fact, because of the fact that no appeal was taken the union has failed to exhaust its administrative remedies. There is no merit to this contention, however, as the matter before the National Labor Relations Board concerned an entirely different dispute between these parties. The charge filed before the Board concerned the employer's alleged refusal to bargain collectively for a new contract after the expiration date of the contract upon which the action before this court was brought. But that isn't the only reason. Furthermore, the relief sought in this court, there is no administrative remedy provided by the Taft-Hartley Act. This was pointed out by Mr. Justice Frankfurter in the case of the Employees of Westinghouse Corporation, 348 U.S., Employees against Westinghouse Corporation, reported in 348 U.S. 437, at page 443, and 444, in discussing the Taft-Hartley Act, and I quote:

"It is significant, however, that breach of contract is not an unfair labor practice. A proposal to that end was contained in the Senate bill but was deleted in conference with the observation 'once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' "

The defendants further aver that this Court is without jurisdiction in this case and urges that jurisdiction is exclusively vested in the National Labor Relations Board. The Supreme Court has ruled otherwise in three recent cases decided June 3, 1957. Textile Workers Union of America vs. Lincoln Mills of Alabama, 353 U.S. 448; 77 Supreme

Court 912; General Electric Company against Local 205, United Electrical, Radio and Machine Workers of America, 353, U.S. 545, 77 Supreme Court 921; Goodall-Sanford, Inc., against United Textile Workers of America, A.F.O.L. Local 180, 383 U. S. 350, 77 Supreme Court 920. These three cases hold that United States District Courts do have jurisdiction to decree specific performance of an agreement to arbitrate grievance disputes contained in collective bargaining agreements by virtue of the statute under which this action is brought. The General Electric case involved a grievance as here, that an employee had been wrongfully discharged.

Defendant's last defense is that the question before the Court is moot, the contract having expired April 4, 1957. Article 4, Section 1, of the Collective Bargaining contract reads as follows: "Should it be determined by the complaint or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provision of this agreement, the company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost."

Under that section, if an arbitrator should determine, after it hears the case in arbitration, should the decision be that the employer violated this contract in January of 1957 when it discharged these ten or eleven men, then the employer is liable for back pay to those men for the time lost, and this same question of mootness was decided by the Supreme Court in this Lincoln case decided in June of this year. In the Lincoln case that same question of mootness was raised because it was there urged also that the mill had terminated its operation and all work had ceased, but the Supreme Court took cognizance that some of the grievances concerned back pay and stated "Insofar as the grievances of the restoration of work loads and job assignments, the case is of course moot, but to the extent that they sought a monetary award the case is a continuing controversy."

The pleadings and affidavits in this case make it clear that there is no genuine issue as to any material fact in this case. During the period a collective bargaining agreement was in effect between these parties, a bona fide grievance or a difference—and the word "difference" is the language that I just read to you that is in the contract—arose, and there can't be any doubt when you read these affidavits and see what was said here in court yesterday and was said here again today, there can't be any doubt that there is a difference of view as to whether this man was discharged or whether he quit and went out on strike. I don't know; I am not attempting to rule which one is right, but it is a matter relating to the question of discharge of employee. The contract which was signed by both of these parties—the union on the one hand and the employer on the other—said that matters relating to discharge shall go through this effort to settle their differences by these different steps—1, 2 and 3. The employer recognized that there was a grievance and a difference back there months ago because the employer did go through steps 1, 2 and 3 under the provisions of the contract and in one of the letters written by Mr. Marshall to the union, at the very head of the letter, this letter is written to Harold Johnson by Mr. Marshall for the defendant under date of April 6, 1957, and what is the letter about? Well, Mr. Marshall points out right at the beginning of the letter—in regard what? The grievance issue of William J. Sloan, Richard C. Campbell, and so forth—discharge.

And then, in that same letter, he says in effect that Steps 1, 2 and 3 have either been waived or that has been complied with, so therefore there was no question back there a long time ago that this was a grievance or a difference or a dispute over discharge which is covered by this contract and which the contract says that it, upon the request of either party, shall be decided by arbitration.

The Supreme Court says that it is the duty of the Federal

Court, where there is such a provision in a contract, and one side does not agree to submit to arbitration, it is the duty of the court to enforce that arbitration agreement, and/or duty of the court to require specific performance of that labor contract which in effect requires arbitration.

As I said there is a bona fide grievance or dispute as to whether these men were wrongfully discharged or whether they quit to go out on strike. The first three steps of the grievance procedure as provided for in the contract were either carried out or waived. The plaintiff union is entitled to have the employer defendant specifically perform the fourth step of the contract—arbitration.

Therefore, the plaintiff's motion for summary judgment is granted and I will ask you to prepare an order to that effect. Prepare it while counsel is here in town and submit it to me and I will sign it.

That is all.

ORDER OF OCTOBER 21, 1957 COMPELLING ARBITRATION

[see Appellant's Appendix, p.]

* * * *

In the Matter of Arbitration

Between:

ENTERPRISE WHEEL AND CAR CORPORATION
Huntington, West Virginia

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO
Local Union No. 4513

Decision and Award of Arbitrator, Milton H. Schmidt

This case was heard by the Arbitrator at the Company plant at Huntington, West Virginia. The parties waived the contract provision for an arbitration board of three members and agreed to submit the matter to the undersigned as the sole arbitrator.

THE GRIEVANCE AND ISSUE

This grievance, filed by eleven employees on January 23, 1957, challenges the action of the Company in discharging them on January 18, 1957. It is claimed that the discharge was without good cause and was not procedurally proper in that the grievants were not first suspended as required by Article IV of the Agreement. Reinstatement with retroactive compensation for all lost pay is requested.

Hearing of the grievance was delayed pending determination by the United States District Court for the Southern District of West Virginia of the enforceability of the arbitration provisions of the agreement, the Company having refused to arbitrate on the claim that the Arbitration Agreement was not enforceable under the West Virginia law. The Court ruled that the arbitration clause was valid and specifically enforceable, relying upon the recent decisions of the United States Supreme Court in *Textile Workers of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448; *General Electric Company* vs. *Local 205, United Electrical, Radio and Machine Workers of America;* 353 U.S. 545; and *Goodall Sanford, Inc.* vs. *United Textile Workers of America,* 353 U.S. 350.

The Company asserts that the grievants quit their employment voluntarily by participating in an unlawful and unauthorized strike; that in any event, even if the termination could be considered a discharge, it was for good cause; and finally that the grievance is moot since the Agreement between the Company and the Union expired by its terms on April 4, 1957.

FACTS AND DECISION

The parties entered into a Collective Bargaining Agreement on April 5, 1956, to continue until midnight, April 4, 1957. No agreement has been entered into by the parties since the latter date.

Article III of the Agreement provided for the settlement

of disputes by the usual four-step grievance procedure with final arbitration of unresolved grievances.

Article IV, Section 1, provided that no employee would be peremptorily discharged, but that in all cases where management determined that an employee's conduct justified discharge, he would first be suspended for not more than five days, with a right to a hearing, during the five day period, on the question of the propriety of the suspension and whether it should be modified or converted into discharge.

This section further provides in part:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for time lost."

The Company had fifty-three employees in December, 1956, and fifty-two employees in January, 1957, within the bargaining unit.

On January 17, 1957, a committee of the Union came to the office of the President and Manager of the Company to protest the action of the Company in discharging an employee, Medley, for alleged repeated absences. This meeting took place about 12:30 P.M., during the lunch hour.

The President stated that he would not alter his previous decision concerning Medley, and that, if the Union considered the action improper, a grievance could be filed. There is some evidence that members of the committee rejected this suggestion. It is claimed that some members of the committee stated, in substance, "We have a better way of handling that" (Tr. 37, 75) but this statement is denied by the Union witnesses who were present at the meeting (Tr. 66, 67, 73).

After a few minutes discussion the men left the office and

returned to the plant. About 1 P.M. the President, Mr. Kraehenbuhl, went into the plant and the eleven grievants were congregated in the washroom discussing the subject of their prior conference. After answering a telephone call the President returned and told the men either to go back to work or to ring out and go outside and figure it out (Tr. 77). Thereupon the eleven employees punched out their time cards and walked outside.

The President stated that at that time he had made no decision to terminate the employment of these men (Tr. 44, 45).

Upon leaving the plant one of the grievants called the Staff Representative and told him about the situation. The Staff Representative advised them to return to the plant and inform the President that they would file a grievance on the Medley matter and return to work.

Shortly thereafter, that is about 30 to 35 minutes after leaving the plant, the grievants went back to the President's office, told him that they had conferred by telephone with the Staff Representative and that they had decided to submit the Medley dispute to the grievance procedure.

The President testified:

> "They wanted to know whether they could come back to work and I said 'No, not with Medley'. Medley couldn't come back. They said 'How about if we keep Medley out, can the rest of us come back in the morning?' And I said 'Yes'. And so they left . . ." (Tr. 45).

The President then, within five minutes, called the Company attorney to tell him what had happened. The attorney advised him that he was under no obligation to take the men back since they had quit their jobs. The President then went into the plant and informed the President of the Union that the eleven men who had gone out "would not be permitted to return at the present time." (Tr. 46).

The Union President, who was laid off at the time of the hearing, did not testify. One of the grievants, Insco, testi-

fied that the Union President did not advise the men that the previous understanding that they were to return to work the following day had been cancelled (Tr. 53, 54).

The following morning, January 18, as the men reported to work they found that their time cards had been removed from the rack. The President of the Company who was in the clock house, told them they "didn't have any job there anymore until this thing was settled one way or the other." (Tr. 53). They were ordered off the property.

The grievants then picketed the plant from January 21 to January 25. The evidence is not clear as to whether they carried picket signs or banners. Other employees respecting the picket line did not report for work during that week (Tr. 41).

The Company introduced evidence that about a month previous to the instance covered by this grievance, there had been a wildcat or unauthorized strike for two days in which most of the grievants and some other employees joined. The men, however, returned to work and no disciplinary action was taken against them.

The men were not expressly told at any time that they were discharged, nor did they receive a preliminary suspension notice.

These facts present the question whether the grievants voluntarily quit their jobs, or, in the alternative, whether their employment was properly terminated for good cause.

The evidence is clear that the men were not discharged when they first left the plant. They were told by the President either to go back to work or ring out and go outside and discuss their problem. He did not consider or state to the men at that time that if they left the plant their act of leaving would be construed as quitting their jobs. Upon their return within a half hour, the President admittedly told them they could return to work the following day. No penalty was suggested or inferred. Presumably the matter was settled at this point. The men left the premises with

the assurance of the President that their jobs were not in jeopardy.

Under these circumstances I am unable to conclude from the evidence that the men had quit their jobs. Or, if their previous leaving could be construed as an intention to quit, then the Company through the President, had excused this brief walk-out by agreeing that they should return to work the following day.

The President, after this agreement, changed his mind upon advice of his counsel, and informed the President of the Union that the men would not be taken back. This second decision was carried out the following day by excluding the men who reported for work from the plant. I interpret these facts to constitute discharge of the grievants.

The grievants were in error in not immediately filing a grievance in the Medley dispute matter, rather than taking the action they did.

As soon as they checked with the Union Staff Representative they corrected their previous mistake and promptly informed Management that they would process the Medley dispute under grievance procedure. As a compromise and settlement of the problem Management agreed to permit them to continue their jobs and directed them to report for work the next morning.

Under these circumstances, it is my judgment that the penalty of discharge was not justified. In any event, the contractual obligation of the Company to suspend prior to discharge was ignored. The walk-out of December 6, 1956, cannot justify the action taken on January 18, since that event was past history and waived by the Company. At least it was not asserted as a justifiable basis or ground for the termination of employment.

The action of the men should not be condoned, despite the first decision of Management to have them return to work without penalty. At most, however, the facts warrant the imposition of a disciplinary penalty of suspension of ten days for each of the grievants.

I cannot agree with the Company's contention that this grievance is moot since the Agreement terminated on April 4, 1957, and no new Agreement has been entered into. Not only was the Agreement effective during and for several months after the grievance arose, but, even after that, the Union continued as the representative and collective bargaining agent for the grievants and all other employees in the unit. Their status as employees continued, during the subsequent period of negotiations for contract renewal. They were protected by the law from improper discrimination or termination of their employment without good cause. Their grievance presented a continuing controversy as to rights of employment reinstatement and back pay.

Article IV of the Agreement imposes an unconditional obligation on the Company to compensate an employee wrongfully discharged or suspended for time lost.

The decision of the Regional Director of the N.L.R.B. refusing to issue a complaint on the charge of the Union that the Company had committed unfair labor practices in violation of Section 8 of the National Labor Relations Act involved different issues than those raised here. This action is therefore no bar to the arbitration of this grievance.

In view of the foregoing, therefore, it is my judgment that the grievants were discharged without good or proper cause; that the discharge be reduced to a suspension for ten days for each of the grievants; that they be reinstated to their former status of employees; that they be compensated for such time as they would have worked, less the suspension period and less such sums as each may have received from other employment.

AWARD

The grievance is allowed as follows:

1. The discharge of each of the grievants which occurred on January 18, 1957, is set aside and reduced to a disciplinary penalty of ten days suspension for each of the grievants.

The ten day period is to be calculated from January 18, 1957.

2. The Company shall reinstate each of the grievants who desire reinstatement to the status of employees with their classifications and seniority status as of the date of their discharge, January 18, 1957.

3. The Company shall reimburse the grievants for all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957.

/s/ MILTON H. SCHMIDT

April 10, 1958

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE

1. Plaintiff says that by order entered herein on October 21, 1957, defendant was ordered to commence specific performance of Step Four of Article III of the Agreement between Enterprise Wheel and Car Corporation and the United Steelworkers of America, dated April 4, 1956, and to expeditiously proceed with the procedure therein set forth.

2. That thereafter, pursuant to said order, the grievance involved was submitted by the defendant and plaintiff to one Milton H. Schmidt for arbitration, and that decision and award issued thereon, a copy of which Arbitrator's decision and award is hereto annexed and marked as Exhibit A.

3. That defendant has failed and refuses to comply with

the Arbitrator's decision and award to reinstate as employees said grievant members of plaintiff labor organization, and has failed and refuses to reimburse said grievant members for all time actually lost from work which they would otherwise have had from defendant.

4. That said Article III of said agreement provides that said award shall be binding on the parties thereto; that upon said decision and award the reinstatement to employment of grievant members of plaintiff labor organization and the payment thereto of wages actually lost as aforesaid, became, was, and still continues, a subsisting duty and obligation of defendant and a subject for compliance pursuant to the direction of said order.

WHEREFORE plaintiff moves the Court for an order directing defendant to show cause, if any it can, why it has not complied with the decision and award of the Arbitrator and reinstate to the status of employees the grievant members of plaintiff labor organization, and to reimburse said grievant members for all time actually lost from work which they would otherwise have had from the defendant, all on the terms contained in said award, and if no good cause be shown, for such further order pursuant to Rule 70 of the Rules of Civil Procedure in aid of the enforcement of said Order of October 21, 1957, and as the nature of the case may require.

JAMES P. CLOWES
Attorney for Plaintiff
207 Riley Law Building
Wheeling, West Virginia

CARNEY M. LAYNE
Attorney for Plaintiff
Inland Mutual Insurance Building
1017 Sixth Avenue
Huntington, West Virginia

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER AND RESISTANCE OF DEFENDANT TO PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE

I

The defendant for answer and resistance to the plaintiff's motion to show cause alleges and asserts the following jurisdictional defenses:

First Jurisdictional Defense

The Court lacks jurisdiction over the subject matter for the reason that plaintiff seeks to enforce an arbitration award personal to individual grievants.

Second Jurisdictional Defense

The Court lacks jurisdiction to issue a show cause order in this action to enforce the award of the arbitrator because this action was concluded and finalized when the final order of October 21, 1957, ordering resort to the arbitration procedure of the contract of April 5, 1956, was complied with by submission of the grievances involved to arbitration; the plaintiff's motion for a show cause order being in actuality a new, separate and distinct action to enforce the award of the arbitrator.

In the alternative, should the Court deny the jurisdictional defenses set forth above, the defendant for further answer and resistance to the plaintiff's motion to show cause alleges and asserts the following:

1. Defendant admits the allegations contained in para-

graph 1 of the motion to show cause with the exceptions that by the Court order of October 21, 1957, specific performance of Step Four, Article III of the contract was to begin 35 days from October 21, 1957, and that the contract itself was dated April 5, 1956 instead of April 4, 1956, as alleged.

2. For answer to paragraph 2 of the motion to show cause, defendant admits that the grievances ordered by the Court to be arbitrated were submitted by the plaintiff and defendant to Milton H. Schmidt for arbitration under the terms and conditions of the contract of April 5, 1956; that hearing was held before said arbitrator on January 3, 1958; that on April 10, 1958, he rendered what is denominated "Decision and Award of Arbitrator, Milton H. Schmidt", a copy of which plaintiff has attached to its motion as its "Exhibit A."

3. For answer to paragraph 3 of the motion for defendant to show cause, defendant admits that it has not complied with the "decision and award" of the arbitrator for the reason that said "decision and award" is illegal, improper, invalid and void and defendant alleges that this is so because of the following:

(a) the arbitrator exceeded the powers vested in him as arbitrator under the terms, provisions, and limitations set forth in the contract entered into on April 5, 1956, expiring on April 4, 1957, and the arbitrator without authority amended, modified and enlarged upon the provisions of said contract and agreement;

(b) the arbitrator by his award so imperfectly executed the duties and responsibilities placed upon him that a final and definite award upon the subject matter submitted was not made;

(c) the arbitration award was not in accordance with law.

For further answer to paragraph 3 of the motion for defendant to show cause, defendant alleges that the contract

under which arbitration was had expired and terminated on April 4, 1957; that since that date all the employees of defendant have worked without any contract whatsoever and the terms, conditions and rights of the terminated contract were not extended to them, but this notwithstanding, the award of the arbitrator would apparently grant reinstatement of the grievants and back pay at their regular rates less amounts each received for other employment not only from ten days after January 18, 1957 (this ten-day period embracing a suspension period meted by the arbitrator) to April 4, 1957, but ad infinitum. However, the illegal, improper, invalid and void award of the arbitrator notwithstanding, defendant while refusing to reinstate the grievants did nevertheless offer to pay the grievants at their regular rate of pay for their actual losses from the end of the ten-day suspension period to April 4, 1957, the expiration date of the contract, but said offer was refused.

4. For answer to paragraph 4 of the motion for defendant to show cause, defendant denies that the award of the arbitrator is binding on it and denies each and every other allegation of said paragraph.

WHEREFORE, defendant prays that the Court deny the motion of the plaintiff for defendant to show cause because of lack of jurisdiction to consider same, or in the alternative, should the court determine it has jurisdiction to consider the motion to show cause, defendant prays, without waiver of right to except to the ruling on said jurisdictional question, that the Court vacate the award of the arbitrator dated April 10, 1958.

ENTERPRISE WHEEL AND CAR CORPORATION

/s/ WILLIAM C. BEATTY

/s/ E. JACKSON BOGGS

of Counsel

FITZPATRICK, MARSHALL, HUDDLESTON & BOLEN

Counsel for Defendant

P. O. Box 468 Huntington, West Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER

On the 11th day of December, 1958, came the plaintiff by James P. Clowes and Carney M. Layne, its counsel, and came the defendant by William C. Beatty and E. Jackson Boggs, its counsel, and this matter came on to be heard on the plaintiff's motion for defendant to show cause and the defendant's answer and resistance thereto, and the affidavit of Oscar Kraehenbuehl in support of said answer and resistance; upon consideration of which the Court does hereby ADJUDGE AND ORDER the defendant to show cause in conformity with plaintiff's motion, to which action of the Court the defendant, by counsel, objected on the grounds of the lack of jurisdiction of this Court as set forth in its answer and resistance; whereupon defendant asked leave that its answer and resistance to said motion to show cause and the affidavit of Oscar Kraehenbuehl in support of said answer and resistance be taken and treated as its answer to the Court's order to show cause; and there being no objection thereto, and the Court perceiving none, said leave is granted and defendant's answer and resistance to said motion and affidavit of Oscar Kraehenbuehl in support thereof is ORDERED to be, and is hereby, taken and treated as defendant's answer to the said order of the Court to show cause.

Thereupon by agreement of the parties the matter came on for hearing on plaintiff's motion to show cause, the order of the Court for the defendant to show cause in conformity with said motion, the defendant's answer and resistance thereto, and the Affidavit of Oscar Kraehenbuehl in support of said answer and resistance, the facts agreed by the parties as shown in the pleadings, exhibits and admissions at the hearing made by the parties in open court, and the matter

proceeded to final hearing on the showing of cause by defendant, and was submitted by the parties to the Court for final decision.

ENTER: This..... day of December, 1958.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

Transcript of proceedings had and testimony adduced at a hearing in re the above-styled action in the United States District Court for the Southern District of West Virginia, held in the United States Post Office and Courthouse Building in the City of Huntington, West Virginia, on the 11th day of December, 1958, BEFORE:

THE HONORABLE HARRY E. WATKINS,
Judge of the United States District Court
for the Northern and Southern Districts
of West Virginia.

* * * * * *

Pages 3-5:

THE COURT:

. . . . Now, I want to ask counsel for the defendant first if there is anything in the motion to show cause in the way of facts that are denied? I don't recall from reading the briefs here whether there are any facts set forth in the motion to show cause that are denied. You rely—your defense is on matters of law. You admit that the award was made; it was filed; and therefore you asked the Court to look at the award and look at the—contract is also in evidence, is it not?

MR. BEATTY: Yes, sir, it is.

THE COURT: It is in evidence with the original action?

MR. CLOWES: Yes, sir.

THE COURT: We have the contract; the award of the commissioner arbitrating, and then you raise certain legal points relating to that. I don't believe that you deny any facts set forth there. Are there any facts?

MR. BEATTY: No, sir, there are no facts. The only thing we did was allege some additional information that—

THE COURT: Now, first I am going to ask you this question, it is going to be to them, whether or not they dispute any of the facts set up in your answer. My first question to you is whether or not you have denied any of the facts set up in their motion. I think—

MR. BEATTY: No sir, you're entirely correct in saying that we have not.

THE COURT: All right. Therefore I will then ask Mr. Clowes the next question, do you deny any of the facts that are set up in their answer in resistance of defendant to plaintiff's motion for defendant to show cause?

MR. CLOWES: Yes sir, we do deny the statement in the middle of the last paragraph on page 3 that since that time all employees of defendant have worked without any contract whatsoever. We do deny that fact.

THE COURT: Well, now, let's take that. Is that a matter also of construction or is it a matter of fact, that since then all employees have worked without any contract whatsoever, and the terms, conditions and rights of the contract were not extended to them, and you might elaborate on that.

MR. CLOWES: We will stipulate that there was no written contract. There was an agreement entered into with the employees by Kraehenbuhl that the men would continue to—could work under the terms of a negotiated settlement which was in effect, the terms of the old contract, plus wage increase.

Pages 6-10:

THE COURT: Well, why wouldn't it be better to take it up in sequence. You're telling me that sometime earlier there was an oral contract with Mr. Kraehenbuhl. Then you go back and say there was another contract when it was terminated. You get me confused. Let me take them in sequence.

MR. CLOWES: Very well, in chronological order, the old contract expired.

THE COURT: By its terms on April 4, 1957.

MR. CLOWES: By its terms on April 4, 1957. The union bargaining committee or negotiating committee and management—Mr. Marshall and Mr. Johnson, the representatives of the union, came to an agreement for a collective bargaining agreement to extend for a period of two years. The terms of that contract, which was approved by the union membership, incidentally in meeting was that the terms and conditions of the contract which had expired on April 4, 1957 would be extended for a period of two years and that the company would grant wage increases, a certain amount for the first year and an additional amount for the second year. That was agreed upon. Mr. Marshall at that time stated that they would not enter into a contract unless and until the union agreed that it would drop the arbitration which was the subject of this suit. The union and the bargaining committee stated that they could not do so; they had no authority to bargain away the rights of their men, so they went on strike because of no contract. At a later time, when the men were financially pinched, they went to Mr. Johnson, their union representative, and asked if they could go and talk to Mr. Kraehenbuhl about going back to work under the terms of the contract as had been agreed upon previously but which was upset by this arbitration business. Mr. Kraehenbuhl agreed, after consultation presumably with Mr. Marshall, that the men could return to work and would work under the contract as ne-

gotiated, and that is the situation and it has existed up until the present.

THE COURT: Well, they have continued to work?

MR. CLOWES: Yes, sir, and the bonus plans which were in effect under the old contract, the bond purchases which was in the old contract, the grievance procedures in the old contract, the wage increases as has been granted were all performed by the company.

THE COURT: Well, but they had no actual written contract?

MR. CLOWES: No written contract, no sir.

THE COURT: They had been worked, you say, under this negotiated contract.

MR. CLOWES: Yes, sir.

THE COURT: Now, is there a dispute as to those facts?

MR. BEATTY: Yes, sir, I believe there is. We, of course, do not agree that the men have an oral contract as stated by Mr. Clowes here. Now, I have Mr. Kraehenbuhl here and I am willing to put him on and give his testimony to this effect.

THE COURT: And do you have your employees here to hear that matter?

MR. CLOWES: No sir. The situation was this, Your Honor please. They filed, subsequent to the filing of their answer, the affidavit of A. E. Kraehenbuhl in support of their answer. We have prepared a motion to strike that affidavit as being immaterial and impertinent. We also, in the alternative, have the affidavits of two of the negotiating committee to submit to Your Honor in opposition to the affidavit filed by Mr. Kraehenbuhl.

THE COURT: Well, affidavits of neither side are generally proper. The proper way—when you get into court—is to bring witnesses in to testify. I don't want to read affidavits. I want the witnesses to testify.

MR. CLOWES: If Your Honor please, if the Court feels that that particular issue of contract is material we can get

our witnesses in a matter of half an hour or so, but we have taken the position, Your Honor please, that even if no contract at all had existed subsequent to April 4, 1957 this still would not have been any defense on the part of the defendant company.

We have cases which have held that the matter is a continuing controversy which goes beyond the expiration date of the contract. It could be likened to an automobile insurance—liability insurance policy, that would expire say on April 4, 1957 with an accident having occurred in January. The company is still liable for anything which goes beyond the date of that contract, an injured person who would have doctor bills and hospital bills that would go beyond the expiration date of the contract would still be compensated for through the terms of the policy. I think that the Lincoln Mills case is one case in particular. I think we have cited a number of them in our brief which says if it isn't in grievance—even if the company goes out of business entirely it is still a continuing controversy up until the time that it does get out of business.

* * * * * *

Pages 20-24:

THE COURT: Well, you say that no new collective bargaining contract has been negotiated. Well, does the company deny that they did have a meeting and attempt to negotiate and did agree on some provisions, and then the union, as I understand it, they did meet and agree on some —negotiate—try to—on a new contract, and agreed on some things, but then the union people came along and said, no, we can't sign this until this old dispute is also settled, and therefore, there was no—no written contract was really written up and signed. That is true, I understand.

MR. BEATTY: Yes, sir.

THE COURT: What I have just stated, Mr. Beatty?

MR. BEATTY: Mr. Kraebenbuhl agrees with that statement, your honor.

THE COURT: Agrees. Then, later on, as I understand the facts, they say that the union people got hard pressed and they said they wanted to work and they went to their officers to try to see if they couldn't go to work. Is that denied?

MR. BEATTY: Mr. Kraehenbuhl—Your Honor, may I speak off the record because I don't want to testify, but Mr. Kraehenbuhl says his impression is that some of them went to work before that.

MR. CLOWES: That is correct, some of them went to work before this other agreement was reached, while the strike was on.

THE COURT: What I say is true except for the one thing, that some of them did go back earlier before they even talked with their union men?

MR. BEATTY: That is correct, Your Honor.

THE COURT: But anyhow those who went to see the union men and who had not worked, the union people then said, yes, go ahead and go to work and they did go to work.

MR. BEATTY: But without an agreement.

THE COURT: Well, I know, they went ahead and went to work.

MR. BEATTY: Yes, sir.

THE COURT: Now, the only difference is that the union people say that they had an understanding then when they went to work that they were going to work under the unwritten negotiations for a new contract which they had previously discussed and agreed upon. That's what the union people say. Mr. Kraehenbuhl says that there was no such negotiation. Is that true?

MR. BEATTY: That's right, Your Honor.

THE COURT: That they went back to work and nothing was said about them working under the unwritten negotiations that they had previously had, is that correct?

MR. BEATTY: That is correct.

THE COURT: Well, now, we understand each other.

Then let me ask you one other point. Then they say in their affidavit here that the company did give an increase in wages, and the amount of increase in wages was what they had previously talked about in trying to negotiate a new contract.

MR. BEATTY: They did agree upon a wage increase, an informal thing, which Mr. Kraehenbuhl just discussed with employees. It was not in these negotiations that we have been speaking of.

THE COURT: Well, that is my question. They were given an increase.

MR. BEATTY: Yes, but not through these negotiations.

THE COURT: Yes, but was the amount of the increase the same as they had talked about and upon in the negotiations?

MR. KRAEHENBUHL: We never agreed on what was in the negotiations. The agreement was made with the men. They were outside the fence. We made the agreement between them without the union being there.

THE COURT: I understand that. But was the amount of the increase the same as you had talked about and, I understand, had agreed upon for your new contract that was never written up?

MR. KRAEHENBUHL: No, that isn't quite—the whole deal is there was an offer made—

THE COURT: Well, was the amount of the wages when they did come back the same as you had agreed upon in your negotiations?

MR. KRAEHENBUHL: It was a little more; a little higher.

THE COURT: It was more?

MR. KRAEHENBUHL: Yes, than the final offer we made in the negotiations.

THE COURT: Well, I think really with this on the record it seems to me that the affidavit can come in.

MR. BEATTY: Your Honor, I would like to point out—

THE COURT: Without the affidavit of the employees because the affidavit—I see nothing that is in controversy.

MR. CLOWES: Under the circumstances, I think Your Honor is correct. There is nothing in controversy.

THE COURT: And, there isn't anything in this affidavit of Mr. Kraehenbuhl that is different from your position in the matter except this last part.

MR. CLOWES: That is correct.

THE COURT: And I have now brought out in the record what part is admitted as to that.

MR. CLOWES: Yes, sir.

* * * * * *

Pages 31-36:

THE COURT: Well, do you conceive what I have just said, that if a person accepts the discharge and says I never intend to work for them again, I am not asking—I am not seeking reinstatement. I accept the fact that I have been discharged, and so far as reinstatement is concerned, but I do want my damages for lost earnings, then do you not say that his measure of damages would be the difference between the date of his discharge and the date of the termination of the contract? Sometimes if I get your position on one phase, it helps me reason on the other phases.

MR. CLOWES: Well, if Your Honor please, I would think that I would even go further than what Your Honor has stated. I think that his rights accruing to him would continue until such time as the offer is made to him for reinstatement and for back wages. If, on that occasion, he would state that I don't want to go back to work for you or I don't want my back wages, then that would stop right there.

THE COURT: Well, let's advance that date; suppose he tells them right away after he is discharged I am not seeking reinstatement.

MR. CLOWES: Then I think his rights are terminated as of that date. I think if we can use the hypothetical situation that on April 8th he would go to management and say I don't want to work here any more; I don't want any back wages or anything else, I think his rights would be terminated as of that date, in which case he wouldn't be a grievant and have proceeded through on this case.

THE COURT: Let me ask you this, you take the position then that the company's way of getting out of this dilemma is to first reinstate him, the contract is ended, you don't contest the fact that the company could discharge him the day they reinstate him?

MR. CLOWES: No, sir, I do not.

THE COURT: Because there is no contract.

MR. CLOWES: I won't go to that extent. There is no written contract. If they would fire a man for something apart from this particular situation right here after they have reinstated, that is entirely a different matter unrelated to this in any way. They can't discriminate under National Labor Relations Act or cause any wrongful discharge.

THE COURT: Of course, that's a different proposition.

MR. CLOWES: Yes, sir, that's a different proposition.

THE COURT: But certainly the existing contract would have been terminated—I mean the written contract that they had before would certainly be ended and under the provisions of that contract he would have no right to continue, would he

MR. CLOWES: If he didn't fall within the provision of a new contract the company would then have the right to hire, fire and do anything.

THE COURT: That is what I mean.

MR. CLOWES: Yes, sir.

THE COURT: Well, that is your position. Now you folks say, of course, that I have no jurisdiction to hear the case, and I might say that I'm not troubled about that. I

have already taken jurisdiction and I might say that I am going to continue to follow through with this case and render some sort of a decision. I can tell you that part of the decision is going to be that. I want to read all your cases and study your briefs a little bit more on this point—relating to the termination date of the contract and its effect on his reinstatement and his damages—the measure of damages.

You say that the contract ended in April of 1957 and that the most that he can receive is damages up to the termination of that contract?

MR. BEATTY: Yes sir, that is exactly right.

THE COURT: And you say you have already offered to pay these amounts?

MR. BEATTY: Yes, sir we have.

THE COURT: You offered that, I suppose, after the case was started in this court?

MR. BEATTY: After the arbitrator made his award.

THE COURT: And after—and before, I suppose, this motion to show cause?

MR. BEATTY: Yes, sir.

THE COURT: Was ordered?

MR. BEATTY: Yes, sir.

THE COURT: You did that, is it not true, not admitting—you did not admit that he was entitled to anything after the date of discharge—you did that merely as a way of getting rid of the case, as I understand it.

MR. BEATTY: That's right.

THE COURT: You still say that the arbitrator had no authority to do anything?

MR. BEATTY: To do it—in other words to reach the award that he reached; that he exceeded his authorities and our points, as stated, on the law, he went beyond his authority, and his contrariness to the principles of law.

THE COURT: Now, you have made a motion—the plaintiff has—to show cause, and, of course, that is how we get to court here today. I suppose what you're really doing is you're showing cause by reason of what you have set forth in your affidavit, in your answer, and in your briefs.

MR. BEATTY: That is the way I would look at it.

* * * * * *

ORDER ENFORCING THE ARBITRATOR'S AWARD

[See Appellant's Appendix p. 2]

OPINION OF THE DISTRICT COURT

[See Appellant's Appendix p. 3]

[fol. 41] Minute Entry of Argument and Submission—April 16, 1959 (omitted in printing).

[fol. 42]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION, Appellant,

versus

UNITED STEELWORKERS OF AMERICA, Appellee.

Appeal From the United States District Court for the Southern District of West Virginia, at Huntington.
Harry E. Watkins, District Judge

Argued April 16, 1959

Before:

Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

William C. Beatty (E. Jackson Boggs, and Fitzpatrick, Huddleston, Bolen & Hudgins on brief) for Appellant, and

James P. Clowes and David E. Feller (Carney M. Layne, Arthur J. Goldberg, and Jerry D. Anker on brief) for Appellee.

OPINION—Decided June 16, 1959

Soper, Circuit Judge:

The question in this case is whether the District Court [fol. 43] had power under Sec. 301 of the Labor Manage-

ment Relations Act, 29 U.S.C. Sec. 185, to require specific performance by an employer of the provisions of the award of an arbitrator to whom a labor dispute had been referred in accordance with the terms of the contract between the employer and a labor union which represented the employees. The award directed the reinstatement of certain discharged employees and reimbursement for loss of wages. The suit was resisted by the employer on the grounds (1) that the court lacked jurisdiction over the subject matter and (2), if the court had jurisdiction, the award was invalid because (a) the arbitrator exceeded his power and (b) the award was uncertain and incomplete. The District Judge overruled these objections and ordered that the employer comply with the decision and award of the arbitrator and this appeal followed.

The suit was brought under Sec. 301 of the statute in the first instance to secure specific performance of an agreement to arbitrate employee grievances contained in a collective bargaining agreement between Enterprise Wheel and Car Corporation, the employer, and United Steelworkers of America, the representative of the employees. The contract covered the period from April 5, 1956 until April 4, 1957, at midnight. It provided certain procedures for the adjustment of grievances and, in case they failed to bring about a settlement, that the grievances should be submitted to a panel of three members, one appointed by the Union, one by the Corporation and a third as an impartial umpire selected by the parties, and that the decision of the umpire should be final and binding upon the parties.

On January 18, 1957, eleven employees were discharged when they walked off their jobs by reason of a dispute [fol. 44] over the discharge of another employee by the Corporation. The contract provided that the right to manage the plant and to direct the employees was vested exclusively in the Company, including the right to hire and discharge; but the contract also provided that in the exercise of these rights the management should not peremptorily discharge a member of the union but in all instances in which the management might conclude that an employee's

conduct would justify suspension or discharge, he should first be suspended for not more than five days during which he might request a hearing and a statement of his offense and after the hearing the management should conclude whether to convert the suspension into discharge or revoke the same, and that if a discharge was decided upon the employee might present a grievance within five days thereafter.

The Union claimed that the eleven discharged men had a grievance under the terms of the contract but the Corporation rejected this contention, insisting that the men had quit and it refused to reemploy them. The grievance procedures provided by the contract were then invoked but no settlement was reached and, accordingly, the Union called for arbitration but the Corporation refused to arbitrate. A charge of unfair labor practice was filed by the Union before the National Labor Relations Board, but the Board refused to issue a complaint. Finally, on August 22, 1957, four months after the contract had expired, the Union instituted the present suit. The Company answered, raising jurisdictional and other questions, and the Union filed a motion for summary judgment which, after full hearing, the court granted and ordered the Corporation to submit the grievance to arbitration in accordance with the terms of the collective bargaining agreement.

[fol. 45] In obedience to this order, the parties proceeded to arbitration. The arbitrator after hearing reached the conclusion that the penalty of discharge was not justified. He held that the action of the men in quitting their jobs should not be condoned but that the facts warranted only the imposition of a disciplinary penalty of suspension of ten days. He filed his award on April 10, 1958. Therein he directed (1) that the discharge of the men be set aside and reduced to a disciplinary penalty of ten days' suspension, to be calculated from January 18, 1957, and (2) that the Corporation reinstate each of the men who desired reinstatement with classification and seniority status as of the date of the discharge, and (3) that the Corporation reimburse the men for all time actually lost from work, which they would otherwise have had at the regular rate of pay less the ten-day suspension period and less such amounts as

each had received from other employment after the expiration of the ten-day period.

The first contention of the employer is that the District Court lacked jurisdiction over the subject matter of the suit because it was brought by the Union to enforce the personal rights of individual employees and is, therefore, not tenable under the decision in *Employers* v. *Westinghouse Corp.*, 348 U.S. 437. We rejected a similar contention in our opinion in *Textile Workers Union of America* v. *Cone Mills Corp.*, filed this day, and for the reasons therein stated now hold that the District Court had jurisdiction in the pending case.

The second contention of the employer is that the arbitrator exceeded the power vested in him by the collective bargaining contract because he directed that the discharged men be reimbursed for loss of pay which occurred after the expiration of the contract. The award directed the em- [fol. 46] ployer not only to reinstate the grievants but also to reimburse them for all time lost from work at the regular rate of pay less the ten-day suspension period and less such amounts as each had received from other employment after the expiration of the ten-day period. The employer's position is that since the contract terminated on April 4, 1957, the grievants' rights thereunder expired on that day, and thereafter the Corporation had the right to discharge them at will and without cause so long as the discharge was not for a reason prohibited by the Labor Act. Hence at the time of the rendition of the award they had no right to reinstatement and no right to back pay beyond the expiration date of the contract. On this account the contention is made that the award is void and should be vacated.

This result does not follow from the premises although it may be in accord with the earlier rule that when an award goes beyond the terms of the submission agreement the entire proceeding will be vacated. The view now prevailing is that even if the award exceeds the scope of the arbitration agreement it is not invalid *in toto* but only so far as it is excessive, if it is of such character that the court can separate the part within from the part beyond the submission. See *Lyle* v. *Rodgers*, 18 U.S. 394, 409; *McCormick* v. *Gray*, 54 U.S. 26, 39; *York & Cumberland*

R.R. Co. v. *Meyers*, 59 F.S. 246, 252; *De Groot* v. *United States*, 72 U.S. 419, 430-31; *Marceron* v. *Chevy Chase Services, Inc.*, D.C. Cir., 258 F.2d 155, 158; *Moyer* v. *Van-Dye-Way Corp.*, 3 Cir., 126 F.2d 339, 341; 3 Am. Jur.; *Arbitration & Award*, Secs. 123, 134; 6 C.J.S., *Arbitration & Award*, Sec. 89; Sturges, *Commercial Arbitration Awards*, Sec. 226 (Vernon Law Book Co., 1930). It follows that the award in this case should not be stricken down completely if the valid and invalid parts can be separated by the court.

[fol. 47] We are told by the Union that the award is completely valid and that there is no need to restrict it to the contract period. It is assumed that if the men had not been wrongfully discharged, their employment would have continued indefinitely and hence their recoverable loss continues until the present date; and that to hold otherwise would make it possible for an employer to plan a mass number of discriminatory discharges to take effect shortly before the expiration date of the contract without incurring any liability and thereby accomplish the precise thing which the labor contract is designed to prevent. Our attention is called to decisions of the Labor Board in which it held that a recovery for loss of wages caused by discriminatory discharge should cover the period after as well as the period before the expiration date of the contract because the loss would not have occurred if the discharge had not taken place. See *Western Union Tel. Co.*, 83 NLRB 238; *Victor Metal Products Corp.*, 106 NLRB 1361.

We do not think that these decisions are controlling here. The power of the National Labor Relations Board to formulate policies and prescribe disciplinary procedures to effectuate the purposes of the statute* is not restricted by the terms of the contract between the employer and the union, as must be the case when either party to a labor agreement sues for specific performance or breach of contract under Sec. 301 of the statute. The general provisions of the Labor Act govern the employer-employee relationship under the guidance of the Labor Board while Sec. 301 of

* See 29 U.S.C. Sec. 160(c); *May Department Stores Co.* v. *Labor Board*, 326 U.S. 376, 390-2.

the statute is designed to afford the parties to a labor contract an opportunity to enforce the rights which they derive from that agreement. So it has generally been held [fol. 48] that collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute. See *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 5 Cir., 119 F.2d 509, 515, cert. den. 314 U.S. 656; *Elder* v. *New York Cent. R. Co.*, 6 Cir., 152 F.2d 361, 364; *Beeler* v. *Chicago R. I. & P. Ry.*, 10 Cir., 169 F.2d 557, 559, cert. den. 335 U.S. 903; *Edelstein* v. *Duluth M. & I. Ry. Co.*, 225 Minn. 508, 520; *Walker* v. *Penn-Reading S.S. Lines*, 142 N.J. Eq. 588, 600-01.

The rights which the employees derived from the 1956-57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time. *Meadows* v. *Radio Industries*, 7 Cir., 222 F.2d 347, 349; *Atchison T. & S.F. R. Co.*, v. *Andrews*, 10 Cir., 211 F.2d 264, 265; *Warden* v. *Hinds*, 4 Cir., 163 F. 201; 35 Am. Jur., *Master & Servant*, Sec. 19 (pp. 457-58); American Law Institute Restatement, *Agency*, Sec. 442. The same principle is applied where a contract of employment contains a provision allowing termination after a period of notice has been given. In such cases damages for wrongful discharge are limited to the notice period since at the expiration of the period the right of the employer to discharge the employee is unrestricted. See *United Protective Workers* v. *Ford Motor Co.*, 7 Cir., 223 F.2d 49, 52; *Odell* v. *Humble Oil & Refining Co.*, 10 Cir., 201 F.2d 123, 128, cert. den. 345 U.S. 941. It follows that in the pending case the discharged men had no right to damages for loss of time under the contract after its expiration and that the award should be amended [fol. 49] so as to eliminate damages based on the subsequent period. This can easily be done without invalidating the entire award.

It is no answer to this position to suggest that it would afford an opportunity to the employer to indulge in discriminatory discharges on a large scale. Such a situation might well be handled as was done in *Labor Board* v. *Waterman S.S. Co.*, 309 U.S. 206, 218-19, where it was held that the Labor Board may forbid a wholesale discharge of employees, whose tenure is determinable at will, if the discharge is undertaken to effect a purpose forbidden by the Labor Act. Furthermore, the whole matter is subject to regulation by agreement between the parties which may provide for the continuation of the same contract terms in subsequent labor agreements curtailing the common-law right of the employer to discharge employees without cause. In the present case the agreement was for one year, expiring April 4, 1957, and, as we understand the record, there was no renewal thereof for the subsequent year.

Finally, the Corporation makes the point that the award of the arbitrator was incomplete and indefinite and therefore incapable of enforcement. As we have seen, the award directed the Corporation to reinstate the grievants and compensate them for the time lost less the ten-day suspension period and less such amounts as they may have received from other employment; but the arbitrator failed to include in the award the amounts which had actually been earned or, by the exercise of due diligence, could have been earned by the grievants in other employment. It has generally been held that a final award must be certain in its terms or provide means and data by which it may be made certain by mathematical calculation, and that if it is deficient in this [Vol. 50] respect it must be vacated since the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. See 3 Am. Jur., *Arbitration-Award*, Secs. 84, 125; 104 A.L.R. 710, 718, 725.

If this rule were given effect in the pending case the award would be set aside, for it is obviously so incomplete that disputes may well arise as to the amounts of back pay which the employer is obliged to make to the discharged workers. We think, however, that the rule forbidding the resubmission of a final award, which was developed when the courts looked with disfavor upon arbitration proceed-

ings, should not be applied today in the settlement of employer-employee disputes. As pointed out in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, Congress has clearly indicated that the arbitration of grievance disputes for the preservation of industrial peace is to be encouraged and the Supreme Court has directed the federal courts to fashion a federal substantive law in accordance with this policy. This may readily be done in the pending case by requiring the parties to take steps to complete the arbitration so that the amounts due the grievants for loss of time will be definitely ascertained. Accordingly, the judgment of the District Court is affirmed, insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but is modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

Judgment modified and case remanded for further proceedings.

[fol. 51]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION, Appellant,

vs.

UNITED STEELWORKERS OF AMERICA, Appellee.

Appeal From the United States District Court for the Southern District of West Virginia

JUDGMENT—Filed and Entered June 16, 1959

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Huntington, for further proceedings in accordance with the opinion of this Court; and that the costs on appeal be divided equally between the parties.

June 16, 1959.

Morris A. Soper, United States Circuit Judge.

[fol. 52] Petition for Rehearing covering 21 pages filed July 10, 1959, omitted from this print.

It was overruled and nothing more by order, August 24, 1959.

[fol. 76] July 27, 1959, memorandum of appellant in opposition to petition for rehearing filed by leave of court.

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

[Title omitted]

Appeal From the United States District Court for the Southern District of West Virginia, at Huntington.

ORDER MODIFYING OPINION—Filed and Entered August 24, 1959

It is ordered that the opinion of the Court, filed herein on June 16, 1959, be modified so as to substitute the following in place of the last sentence of said opinion:

Accordingly, the judgment of the District Court is affirmed insofar as it holds that the Court has jurisdiction to direct the specific performance of the award, but the judgment is modified so as to omit the requirement that the Enterprise Wheel and Car Corporation comply with the award of the Arbitrator insofar as the award requires the reinstatement of the discharged employees; and the judgment is further modified so as to limit the recovery of wages for loss of time to the period of the contract and to [fol. 77] require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

Morris A. Soper, United States Circuit Judge.

Clement F. Haynsworth, Jr., United States Circuit Judge.

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

[Title omitted]

Appeal From the United States District Court for the Southern District of West Virginia, at Huntington.

ORDER OVERRULING PETITION FOR REHEARING—
Filed and Entered August 24, 1959

The petition for rehearing in the above entitled case, having been read and considered, it is ordered that the same be and is hereby overruled.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

Morris A. Soper, United States Circuit Judge.

Clement F. Haynsworth, Jr., United States Circuit Judge.

[fol. 78] September 5, 1959, mandate issued and transmitted to the Clerk of the United States District Court at Huntington, West Virginia.

September 5, 1959, record returned to the Clerk of the United States District Court at Huntington, West Virginia.

[fol. 79] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 80]

SUPREME COURT OF THE UNITED STATES

No. 538, October Term, 1959

UNITED STEELWORKERS OF AMERICA, Petitioner,

vs.

ENTERPRISE WHEEL AND CAR CORPORATION.

ORDER ALLOWING CERTIORARI—January 11, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is set for argument immediately following No. 443.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

ENTERPRISE WHEEL AND CAR CORPORATION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

ENTERPRISE WHEEL AND CAR CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on June 16, 1959.

OPINIONS BELOW

The first opinion of the United States District Court for the Southern District of West Virginia (R. 2a-11)[1] was delivered orally and is not reported. The second opinion of the District Court (R. 1a-3) is reported at 168 F. Supp. 308.

[1] The record in this case consists in part of the separate appendices to the briefs of the parties in the Court of Appeals. Record references to the appendix of the appellant's brief will consist of the number "1a" (which is the page in the record certified by the Clerk of the Court of Appeals at which the appendix appears) followed by the page number in the appendix. Similarly, record references to the appellee's appendix will consist of the number "2a" followed by the page number in that appendix. Thus, "R. 2a-11" refers to page 11 of the appendix to the appellee's brief. Record references to the proceedings in the Court of Appeals will simply consist of the page number in the certified record.

The opinion of the Court of Appeals (R. 4) as modified (R. 16) is reported at 269 F. 2d 327. The original opinion and the order modifying it are reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1959. A petition for rehearing was denied on August 24, 1959. This court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Employees were discharged during the term of a collective bargaining agreement. The discharges were arbitrated after the agreement had expired. It was found by the arbitrator (a) that the discharges were in violation of the agreement and (b) that the agreement required reinstatement with back pay as the remedy for such a violation. In an action brought under § 301 of the Labor Management Relations Act, the Court of Appeals refused to enforce the reinstatement portion of the award. The questions presented are:

1. Under § 301, are arbitrators' determinations as to remedy to be treated as questions of interpretation and application of the agreement, or as questions of law to be decided by the court?

2. If the question of remedy is one of interpretation and application of the agreement, do the federal courts have the right, under § 301, to review *de novo* the arbitrators' decisions on such questions?

3. If such review is proper, should the provisions of the agreement requiring reinstatement of employees unjustly discharged be construed as being applicable only to cases decided prior to the expiration date of the agreement?

4. If the question of remedy is one of law, as the

Court of Appeals here held, was the court correct in concluding that an arbitrator may not, after the agreement has expired, prescribe restoration of the status quo as a remedy for a violation which occurred during the term of the agreement?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The petitioner, United Steelworkers of America (hereinafter called the union), is the collective bargaining representative for the production and maintenance employees at the Huntington, West Virginia plant of the respondent, Enterprise Wheel and Car Corporation (hereinafter called the company). From April 5, 1956, through April 4, 1957, there was in effect between the parties a collective bargaining agreement prescribing the wages, hours, and other terms and conditions of employment of those employees. The agreement provided, *inter alia*, that no employee could be discharged without first being given a hearing, and that if after such hearing an employee was discharged, he could appeal his discharge to the grievance procedure provided in the agreement. (R. 1a-17) The grievance procedure involved several steps, consisting of discussions between union and company representatives at ascending levels of authority, and included the right ultimately to submit any unresolved grievance to arbitration. (R. 1a-16)

The remedy for unjust discharges was expressly set forth in the agreement as follows:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." (R. 1a-18)

On January 17, 1957, a group of eleven employees covered by the agreement left their jobs in connection with a dispute over the discharge of another employee. Within thirty minutes, the employees were advised by a union staff representative to return. They then requested, and were given, permission from the president of the company to return to work. A few moments later, however, the president, after consulting his attorney, informed the local union president that the eleven men who had gone out "would not be permitted to return at the present time." (R. 2a-20) When the men attempted to return to work the following day, they found their time cards missing from the rack, and they were told that they "didn't have any job there anymore until this thing was settled one way or the other." (R. 2a-21)

On January 23 a grievance was filed, claiming that the men had been discharged improperly and without cause. (R. 2a-18) The grievance was not settled in the preliminary steps of the grievance procedure, and on February 17 the union requested that the matter be submitted to arbitration, in accordance with the agreement. The company first refused to arbitrate. Subsequently, the company changed its position and agreed to submit the matter to arbitration, and Milton H. Schmidt was chosen by the parties as the arbitrator. On April 6, 1957, however, the company again changed its position, and notified the union by letter that it would not arbitrate. (R. 2a-2)

The union then brought an action in the United States District Court for the Southern District of West Virginia, under Section 301 of the Labor Management Relations Act, to specifically enforce the arbitration provisions of the collective bargaining agreement. After the company had filed its answer (R. 2a-8), the union moved for summary judgment. The matter was heard on the pleadings and affidavits. The court rendered an oral opinion (R. 2a-11), and entered an order directing "specific performance of step Four of Article III of the Agreement." (R. 1a-15).

Accordingly, the grievance was submitted to arbitration before Milton H. Schmidt, who had been appointed by both parties in accordance with the procedures specified in the agreement. Mr. Schmidt rendered his decision on April 10, 1958. (R. 2a-17) He ruled that the men had been discharged in violation of the agreement and that their penalty for leaving their jobs without permission should have been only a suspension of 10 days. He further ruled that under the agreement they were entitled to reinstatement, regardless of the fact that the agreement itself had expired. He therefore awarded reinstatement with back pay, minus the pay for the 10-day penalty period. (R. 2a-23)

The company refused to comply with the award, and the union moved the district court for an order directing the company to show cause why it had not done so. (R. 2a-24) The company filed an "Answer and Resistance" to the motion, alleging that the court lacked jurisdiction to enforce the award, and that the award was "illegal, improper, invalid, and void" for several specified reasons, among them the fact that the applicable collective bargaining agreement had expired prior to the date of the award. (R. 2a-26)

On December 11, 1958, the court entered an order to show cause, and by consent of the parties and the court, the show cause hearing was immediately held on the basis of the papers already filed. (R. 2a-29) On December 16, the

court rendered an opinion and an order directing the company to comply with the arbitrator's award. (R. 1a-1, 3).

The opinion of the district court rejected the company's contention that section 301 does not confer on the federal courts jurisdiction to enforce arbitration awards which provide benefits to individual employees. The court noted that the proceeding before it was ancillary to the original action to compel arbitration, over which it plainly had jurisdiction by virtue of the decision of the Supreme Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). It reasoned that if there was jurisdiction to compel arbitration, there must also be jurisdiction to enforce the resultant award. The court also concluded that a show cause proceeding was a proper method to secure compliance with an award, in a case in which the arbitration had been held pursuant to a court order directing the company to comply with its obligations under the arbitration provisions of the collective bargaining agreement.

As to the award itself, the court held that it was valid and enforceable in every respect. It rejected the Company's argument that the award was not sufficiently specific as to the manner of calculating back pay to be enforceable. (R. 1a-9) In answer to the argument that the employees could not be reinstated because the agreement had expired, the court pointed out that

> "To allow the defendant to only reimburse the employees up until April 4, 1957, would be to allow the defendant to profit unfairly from its own wrong doing. If the men had not been unjustly discharged, it must be assumed that their employment would have continued to date; until reinstated, these employees continue to suffer loss of wages by virtue of the defendant's improper action irrespective of any expiration of the contract." (R. 1a-10, 11)

The company appealed this decision to the United States Court of Appeals for the Fourth Circuit. That court agreed

with the district court that section 301 conferred jurisdiction on the federal courts to enforce an arbitration award rendered under a collective bargaining agreement. It held that the failure of the award to specify the manner of calculating back pay did not render it void, and that that problem should be solved by resubmitting the question to arbitration. However, the court concluded that the award in this case could not be enforced in full. The court reasoned that because collective bargaining agreements "do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its term," it followed that employees who were discharged unlawfully during the term of an agreement could not enforce an award ordering reinstatement if the award is rendered after the agreement has expired. On that reasoning, the court modified the judgment "so as to omit the requirement that the Enterprise Wheel & Car Corporation comply with the award of the Arbitrator insofar as the award requires the reinstatement of the discharged employees . . . [and] to limit the recovery of wages for loss of time to the period of the contract . . ." (R. 16)

The union filed a petition for rehearing, asserting that the decision of the court was contrary to decisions of the United States Supreme Court and the National Labor Relations Board which had been rendered subsequent to the argument of the present case in the Court of Appeals, and that the decision was contrary to the precedents and policies on which the court had relied. (R. 15) On August 22, 1959, the petition for rehearing was denied. (R. 17).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law which should be determined by this Court. That is the question of the extent to which a federal court, when it is asked to enforce an arbitration award under section 301 of the Labor Management Relations Act, may or

should review the merits of that award before enforcing it.

The arbitrator in this case decided that the collective bargaining agreement required the employer to reinstate employees who had been unjustly discharged during its term, even though the agreement had meanwhile expired. He based this decision on a clause of the agreement which specifically required reinstatement of employees who were discharged in violation of the agreement, and which was not by its terms limited to cases decided prior to the expiration of the agreement. The company's position apparently was that when the agreement expired, that clause could no longer be applied, even to cases which had arisen prior to the expiration date. The union's position was that the clause was applicable to all cases which arose during the term of the agreement, including those decided after its expiration, just as the arbitration clause itself was applicable, even after the agreement itself had expired, to grievances arising during its term.

The principal question here is not whether the union or the company was correct, but whether a federal court in a section 301 proceeding should review *de novo* a decision which was made by an arbitrator in the performance of his duty to interpret and apply a collective bargaining agreement.

This issue was resolved with respect to commercial arbitration over a century ago, when this Court reaffirmed the common law rule as follows:

> "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or in fact. A contrary course would be a substitution of the judgment of the

Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." *Burchell* v. *Marsh*, 17 How. 344, 349 (1855)

As the court below recognized, many of the rules governing commercial arbitration are not suitable to grievance arbitration problems. (App. 25) The rule that arbitration awards are subject only to the most limited review, however, is one which would seem to fit the needs of grievance arbitration perfectly, since it allows the arbitrator maximum flexibility, which labor relations experts agree he must have in order to perform his function. See, e.g., Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).

The issue here is closely related to the issues now before the Court in *United Steelworkers* v. *American Mfg. Co.*, No. 360 (certiorari granted Nov. 9, 1959) and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, No. 443 (petition for certiorari pending). Those cases each involve an action to compel arbitration, and the question presented in each is whether the court should examine the merits of a grievance before requiring the parties to arbitrate it. Here the action is to enforce an award, and the question is the extent to which the court should review the arbitrator's decision before enforcing it. Both questions are equally important to the development of a sound body of federal law relating to grievance arbitration, as contemplated in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), since they both raise the very fundamental question of the extent to which a court should concern itself with issues which the parties have agreed should be resolved through arbitration.

2. The Fourth Circuit treated the issue in this case not as an issue of contract interpretation for the arbitrator, but as an issue of law for the court. Without referring to the

language of the particular agreement at all, the court held flatly and broadly that an arbitrator may not prescribe as a remedy for violation of a collective bargaining agreement the restoration of the status quo, if the agreement has expired in the interim between the violation and the final arbitration award. Assuming that the court was correct in treating the question as one of law, the court's decision will have such a severe impact on grievance and arbitration procedures under collective bargaining agreements that it should be reviewed by this court.

It is not at all unusual for several months to elapse between the filing of a grievance and the determination of that grievance by an arbitrator. And, as this case demonstrates, it is not difficult for an employer to delay the process further by forcing the union to resort to litigation to enforce the arbitration clause. Thus in many cases an award may be rendered after the applicable collective bargaining agreement has expired.

Most arbitration awards which are favorable to the union provide as a remedy the restoration of the status quo. This is true not only of awards involving discharges, but also those involving subcontracting, lay-offs, transfers, promotions, demotions, etc. In all of these cases, and in many others, restoration of the status quo is plainly the only effective remedy. Therefore, if the holding of the Fourth Circuit is correct, there will necessarily be many instances of violations of collective bargaining agreements which cannot be effectively remedied through arbitration.

Moreover, the decision in the present case threatens to impair the effectiveness of the preliminary steps of the usual grievance procedures as well. Since arbitration is an expensive and time-consuming process, particularly if a large backlog of unresolved grievances is permitted to accumulate, it is important that a large proportion of grievances be settled in the steps preceding arbitration. Prior to the present decision, the mere existence of an arbitration clause

tended to promote prompt and fair settlement of grievances, since each party was aware that if its position lacked merit it would not ultimately be sustained by the arbitrator. Under the Fourth Circuit's ruling in this case, however, it would be advantageous for an employer to delay the settlement of grievances as long as possible, in the hope that by the time they reached arbitration the existing agreement will have expired and awards favorable to the union would not be enforceable.

The present decision, therefore, could seriously impede the smooth operation of grievance and arbitration procedures under collective bargaining agreements. That fact in itself makes the issue here one of great importance, since, as this Court has recognized, federal labor policy puts a great value on such procedures as a peaceful method of settling industrial grievances. See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

3. The decision of the Fourth Circuit conflicts directly with the approach taken by the National Labor Relations Board in *Local No. 611, Int'l Chemical Workers*, 123 N.L.R.B. No. 182, 44 L.R.R.M. 1164 (June 5, 1959), and the Sixth Circuit in *NLRB* v. *Knight Morley Corp.*, 251 F. 2d 753 (1957), upon which the Board's decision relied.

The *Chemical Workers* case arose out of a set of facts very similar to those in the present case. The employer had discharged a group of employees shortly before the termination of a collective bargaining agreement, and the union sought their reinstatement. The grievance had not reached arbitration when the termination date of the agreement approached and negotiations for a new agreement were commenced. The union, instead of continuing to push the grievance to arbitration, made reinstatement of the employees one of the bargaining demands in the negotiations for a new agreement. The employer took the position that the dispute should not be made a part of the negotiations,

but should be settled under the grievance and arbitration provisions of the expired agreement. The union adhered to its position, however, and refused to agree to any over-all settlement which did not provide for reinstatement of the employees. The Board held that the union, by insisting at the bargaining table upon reinstatement of the employees, had committed an unfair labor practice.

This result followed, the Board held, from two well-established principles. The first is that an employer does not violate his duty to bargain collectively if he refuses to discuss a matter at the bargaining table on the ground that it can appropriately be disposed of under the grievance and arbitration procedure of the collective bargaining agreement. See *Timken Roller Bearing Co.* v. *NLRB,* 161 F. 2d 949 (6th Cir. 1947). The second is that it is an unfair labor practice for either party to insist to the point of deadlock on something which the other party is not obligated under the Act to bargain about. See *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958).

The Sixth Circuit had previously held, *Knight Morley Corp.*, that the *Timken* principle was applicable to an employer's refusal to discuss at the bargaining table the Union's demand for reinstatement of certain employees who had been discharged during the term of the agreement, even though the agreement had since expired. The Board in *Chemical Workers* adopted the reasoning of the court in *Knight Morley,* and therefore concluded that it was an unfair labor practice for the union in similar circumstances to insist on reinstatement as a pre-requisite to reaching an agreement. And, in doing so, it expressly relied on the *Lincoln Mills* case and the policy in favor of settling disputes through arbitration.

It is plain that the decision of the Fourth Circuit in the present case is at war with the decision of the Sixth Circuit in *Knight Morley* and the decision of the NLRB in the *Chemical Workers* case. In substantially identical situa-

tions, the Board and the Sixth Circuit say that the remedy is arbitration, not collective bargaining, and the Fourth Circuit says the remedy is collective bargaining, not arbitration. Taken together, the two approaches create this incongruous situation: when an employee is discharged in violation of a collective bargaining agreement and the agreement expires before the case has been arbitrated, the union is powerless to redress the wrong. If the union attempts to gain reinstatement of the employee through arbitration, it would not, under the present decision, be able to enforce a favorable award. If the union asks the employer to discuss the discharges outside the grievance procedure, the employer is free to refuse. If the union made reinstatement of the employees a condition of signing a collective bargaining agreement, it would be guilty of an unfair labor practice. The same dilemma would arise whenever there is an unresolved grievance in existence at the expiration of an agreement, whether it involves a discharge or some other management action which is in violation of a collective bargaining agreement and which could be effectively remedied only by a restoration of the status quo.

The facts of the present case illustrate what can happen to labor relations when no method is available for settling an unresolved grievance. There has been no agreement between the company and the union in this case since April, 1957. The sole obstacle to an agreement has been the dispute over the reinstatement of the eleven employees. (R. 2a-32) The union has felt that it could not forsake the interests of the eleven men who had been wrongly discharged and the company has stubbornly refused to reinstate them. Under the law as it presently stands, there is no way that this problem can be resolved, either through arbitration or through collective bargaining. As a result, the company and the public are not protected by a no-strike agreement, and the employees are not protected by a written agreement as to the terms and conditions of their employment.

4. The reasoning of the Court of Appeals in the present case is inconsistent with the decision of this Court in *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959). The Fourth Circuit based its conclusion that the arbitrator had no power to order reinstatement or back pay beyond the expiration date of the agreement on the premise that once the agreement had expired, the employer would have had the right to discharge any employee with impunity. The union did not quarrel with the premise, but took the position that the holding did not follow from it. The union argued that the question of what the employer might at another time have had the right to do is not relevant to the question of the power of the arbitrator to determine the appropriate remedy for discharges which, when they occurred, were admittedly in violation of the agreement. The union contended that the question of the appropriate remedy, being a question of interpretation and application of the agreement, was exclusively a question for the arbitrator, and that even if it were reviewable by a court, the appropriateness of the remedy would not be determined by what the company would later have had the right to do, but what in all probability it would have done. In other words, the union argued that reinstatement with back pay was the proper remedy, even though the employer would later have had the right to discharge the employees involved, so long as there was no evidence or no allegation that in fact it would have discharged them. This position is supported by the Supreme Court's decision in *Vitarelli*, which was rendered after the present case had been briefed and argued in the Court of Appeals.

Vitarelli involved an employee of the Department of the Interior who had been discharged for security reasons on September 2, 1954. This Court held that the discharge was invalid, since Vitarelli had not been accorded the procedural rights to which he was entitled under an Order of the Department which prescribed procedures for security discharges. That aspect of the case is not relevant here.

The case involved a further complication, however. The Court conceded that the Department would have had the right to discharge Vitarelli summarily, so long as the discharge was not stated to be for security reasons. On October 10, 1956, the Department had sent Vitarelli a new notice of discharge, which purported to be a substitute for the original notice and which did not state that it was based on security grounds. The Government argued, therefore, that even if the original notification of discharge was invalid, the second notification was valid, at least as of the date of its issuance, and thus precluded any reinstatement. The Court rejected that argument:

> "Granting that the Secretary could at any time after September 10, 1954, have validly dismissed petitioner without any statement of reasons . . ., we cannot view the delivery of the new notification to petitioner as an exercise of that summary dismissal power." 359 U. S. at 545.

In other words, this Court held that *while the Government had the power summarily to dismiss Vitarelli, it had not exercised that power, and therefore the remedy for the unlawful discharge was reinstatement with full back pay.*

The dissenting opinion took issue with the majority only as to the question whether the 1956 notification should be deemed a valid exercise of the Department's power to discharge summarily. The dissenters did not disagree with the majority's position that reinstatement would be the appropriate remedy if the power to discharge—although it was present—had not in fact been exercised.

There are of course factual differences between the *Vitarelli* case and the present case. The present case involves private employees whose rights are derived from a collective bargaining agreement; *Vitarelli* involved a Government employee whose rights derived from a Departmental Order. But there is no difference in principle, so

far as the issue with which we are now dealing is concerned. For purposes of this case, the important aspect of *Vitarelli* is that this Court there held that when an employee is unlawfully discharged, the appropriate remedy is reinstatement with full back pay, even though his employer could subsequently have discharged him legally, so long as the employer in fact did not discharge him legally. That principle, which the Court accepted unanimously, is equally applicable in the present case.

Indeed, the argument of the Union in this case follows *a fortiori* from *Vitarelli*. This Court in *Vitarelli* decided that an employee who was unlawfully discharged was entitled to reinstatement *as a matter of law*, although the employer could have subsequently discharged him legally. In this case the parties have themselves provided in their agreement that if an employee is found to have been discharged in violation of the agreement, the arbitrator shall order reinstatement and back pay. The question here is simply whether the arbitrator has the power to construe that provision of the agreement as permitting the same remedy which this Court in *Vitarelli* applied without benefit of any express statutory or other authority. Surely if a court *must*, without benefit of any statute, grant reinstatement in such a case, an arbitrator, who has the power, by agreement, to interpret and apply the contract, *has the authority* to find that reinstatement, even after the contract term, is the indicated remedy for a violation of the contract during its term.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL and CAR CORPORATION,
Appellant,
versus
UNITED STEELWORKERS OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT HUNTINGTON. HARRY E. WATKINS, DISTRICT JUDGE.

(Argued April 16, 1959. Decided June 16, 1959.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

William C. Beatty (E. Jackson Boggs, and Fitzpatrick, Huddleston, Bolen & Hudgins on brief) for Appellant, and James P. Clowes and David E. Feller (Carney M. Layne, Arthur J. Goldberg and Jerry D. Anker on brief) for Appellee.

SOPER, Circuit Judge:

The question in this case is whether the District Court had power under Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, to require specific performance by an employer of the provisions of the award of an arbitrator to whom a labor dispute had been referred in accordance with the terms of the contract between the employer and a labor union which represented the employees. The award directed the reinstatement of certain discharged employees and re-

imbursement for loss of wages. The suit was resisted by the employer on the grounds (1) that the court lacked jurisdiction over the subject matter and (2), if the court had jurisdiction, the award was invalid because (a) the arbitrator exceeded his power and (b) the award was uncertain and incomplete. The District Judge overruled these objections and ordered that the employer comply with the decision and award of the arbitrator and this appeal followed.

The suit was brought under Sec. 301 of the statute in the first instance to secure specific performance of an agreement to arbitrate employee grievances contained in a collective bargaining agreement between Enterprise Wheel and Car Corporation, the employer, and United Steelworkers of America, the representative of the employees. The contract covered the period from April 5, 1956 until April 4, 1957, at midnight. It provided certain procedures for the adjustment of grievances and, in case they failed to bring about a settlement, that the grievances should be submitted to a panel of three members, one appointed by the Union, one by the Corporation and a third as an impartial umpire selected by the parties, and that the decision of the umpire should be final and binding upon the parties.

On January 18, 1957, eleven employees were discharged when they walked off their jobs by reason of a dispute over the discharge of another employee by the Corporation. The contract provided that the right to manage the plant and to direct the employees was vested exclusively in the Company, including the right to hire and discharge; but the contract also provided that in the exercise of these rights the management should not peremptorily discharge a member of the union but in all instances in which the management might conclude that an employee's conduct would justify suspension or discharge, he should first be suspended for not more than five days during which he might request a hearing and a statement of his offense and after the hearing the management should conclude whether to convert the suspension into discharge or revoke the same, and that if a discharge was

decided upon the employee might present a grievance within five days thereafter.

The Union claimed that the eleven discharged men had a grievance under the terms of the contract but the Corporation rejected this contention, insisting that the men had quit and it refused to reemploy them. The grievance procedures provided by the contract were then invoked but no settlement was reached and, accordingly, the Union called for arbitration but the Corporation refused to arbitrate. A charge of unfair labor practice was filed by the Union before the National Labor Relations Board, but the Board refused to issue a complaint. Finally, on August 22, 1957, four months after the contract had expired, the Union instituted the present suit. The Company answered, raising jurisdictional and other questions, and the Union filed a motion for summary judgment which, after full hearing, the court granted and ordered the Corporation to submit the grievance to arbitration in accordance with the terms of the collective bargaining agreement.

In obedience to this order, the parties proceeded to arbitration. The arbitrator after hearing reached the conclusion that the penalty of discharge was not justified. He held that the action of the men in quitting their jobs should not be condoned but that the facts warranted only the imposition of a disciplinary penalty of suspension of ten days. He filed his award on April 10, 1958. Therein he directed (1) that the discharge of the men be set aside and reduced to a disciplinary penalty of ten days' suspension, to be calculated from January 18, 1957, and (2) that the Corporation reinstate each of the men who desired reinstatement with classification and seniority status as of the date of the discharge, and (3) that the Corporation reimburse the men for all time actually lost from work, which they would otherwise have had at the regular rate of pay less the ten-day suspension period and less such amounts as each had received from other employment after the expiration of the ten-day period.

The first contention of the employer is that the District Court lacked jurisdiction over the subject matter of the suit because it was brought by the Union to enforce the personal rights of individual employees and is, therefore, not tenable under the decision in *Employees* v. *Westinghouse Corp.*, 348 U. S. 437. We rejected a similar contention in our opinion in *Textile Workers Union of America* v. *Cone Mills Corp.*, filed this day, and for the reasons therein stated now hold that the District Court had jurisdiction in the pending case.

The second contention of the employer is that the arbitrator exceeded the power vested in him by the collective bargaining contract because he directed that the discharged men be reimbursed for loss of pay which occurred after the expiration of the contract. The award directed the employer not only to reinstate the grievants but also to reimburse them for all time lost from work at the regular rate of pay less the ten-day suspension period and less such amounts as each had received from other employment after the expiration of the ten-day period. The employer's position is that since the contract terminated on April 4, 1957, the grievants' rights thereunder expired on that day and thereafter the Corporation had the right to discharge them at will and without cause so long as the discharge was not for a reason prohibited by the Labor Act. Hence at the time of the rendition of the award they had no right to reinstatement and no right to back pay beyond the expiration date of the contract. On this account the contention is made that the award is void and should be vacated.

This result does not follow from the premises although it may be in accord with the earlier rule that when an award goes beyond the terms of the submission agreement the entire proceeding will be vacated. The view now prevailing is that even if the award exceeds the scope of the arbitration agreement it is not invalid *in toto* but only so far as it is excessive, if it is of such character that the court can separate the part within from the part beyond the submission.

See *Lyle* v. *Rodgers*, 18 U. S. 394, 409; *McCormick* v. *Gray*, 54 U. S. 26, 39; *York & Cumberland R. R. Co.* v. *Meyers*, 59 U. S. 246, 252; *De Groot* v. *United States*, 72 U. S. 419, 430-31; *Marceron* v. *Chevy Chase Services, Inc.*, D. C. Cir., 258 F. 2d 155, 158; *Moyer* v. *Van-Dye-Way Corp.*, 3 Cir., 126 F. 2d 339, 341; 3 Am. Jur., *Arbitration & Award*, Secs. 123, 134; 6 C.J.S., *Arbitration & Award*, Sec. 89; Sturges, *Commercial Arbitration Awards*, Sec. 226 (Vernon Law Book Co., 1930). It follows that the award in this case should not be stricken down completely if the valid and invalid parts can be separated by the court.

We are told by the Union that the award is completely valid and that there is no need to restrict it to the contract period. It is assumed that if the men had not been wrongfully discharged, their employment would have continued indefinitely and hence their recoverable loss continues until the present date; and that to hold otherwise would make it possible for an employer to plan a mass number of discriminatory discharges to take effect shortly before the expiration date of the contract without incurring any liability and thereby accomplish the precise thing which the labor contract is designed to prevent. Our attention is called to decisions of the Labor Board in which it held that a recovery for loss of wages caused by discriminatory discharge should cover the period after as well as the period before the expiration date of the contract because the loss would not have occurred if the discharge had not taken place. See *Western Union Tel. Co.*, 83 NLRB 238; *Victor Metal Products Corp.*, 106 NLRB 1361.

We do not think that these decisions are controlling here. The power of the National Labor Relations Board to formulate policies and prescribe disciplinary procedures to effectuate the purposes of the statute * is not restricted by

* See 29 U.S.C. Sec. 160(c); *May Department Stores Co.* v. *Labor Board*, 326 U.S. 376, 390-2.

the terms of the contract between the employer and the union, as must be the case when either party to a labor agreement sues for specific performance or breach of contract under Sec. 301 of the statute. The general provisions of the Labor Act govern the employer-employee relationship under the guidance of the Labor Board while Sec. 301 of the statute is designed to afford the parties to a labor contract an opportunity to enforce the rights which they derive from that agreement. So it has generally been held that collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute. See *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 5 Cir., 119 F. 2d 509, 515, cert. den. 314 U. S. 656; *Elder* v. *New York Cent. R. Co.*, 6 Cir., 152 F. 2d 361, 364; *Beeler* v. *Chicago R. I. & P. Ry.*, 10 Cir., 169 F. 2d 557, 559, cert. den. 335 U. S. 903; *Edelstein* v. *Duluth M. & I. Ry. Co.*, 225 Minn. 508, 520; *Walker* v. *Penn-Reading S.S. Lines*, 142 N. J. Eq. 588, 600-01.

The rights which the employees derived from the 1956-57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time. *Meadows* v. *Radio Industries*, 7 Cir., 222 F. 2d 347, 349; *Atchison T. & S. F. R. Co.* v. *Andrew*, 10 Cir., 211 F. 2d 264, 265; *Warden* v. *Hinds*, 4 Cir., 163 F. 201; 35 Am. Jur., *Master & Servant*, Sec. 19 (pp. 457-58); American Law Institute Restatement, *Agency*, Sec. 442. The same principle is applied where a contract of employment contains a provision allowing termination after a period of notice has been given. In such cases damages for wrongful discharge are limited to the notice period since at the expiration of the period the right of the employer to discharge the

employee is unrestricted. See *United Protective Workers* v. *Ford Motor Co.*, 7 Cir., 223 F. 2d 49, 52; *Odell* v. *Humble Oil & Refining Co.*, 10 Cir., 201 F. 2d 123, 128, cert. den. 345 U. S. 941. It follows that in the pending case the discharged men had no right to damages for loss of time under the contract after its expiration and that the award should be amended so as to eliminate damages based on the subsequent period. This can easily be done without invalidating the entire award.

It is no answer to this position to suggest that it would afford an opportunity to the employer to indulge in discriminatory discharges on a large scale. Such a situation might well be handled as was done in *Labor Board* v. *Watermann S.S. Co.*, 309 U. S. 206, 218-19, where it was held that the Labor Board may forbid a wholesale discharge of employees, whose tenure is determinable at will, if the discharge is undertaken to effect a purpose forbidden by the Labor Act. Furthermore, the whole matter is subject to regulation by agreement between the parties which may provide for the continuation of the same contract terms in subsequent labor agreements curtailing the common-law right of the employer to discharge employees without cause. In the present case the agreement was for one year, expiring April 4, 1957, and, as we understand the record, there was no renewal thereof for the subsequent year.

Finally, the Corporation makes the point that the award of the arbitrator was incomplete and indefinite and therefore incapable of enforcement. As we have seen, the award directed the Corporation to reinstate the grievants and compensate them for the time lost less the ten-day suspension period and less such amounts as they may have received from other employment; but the arbitrator failed to include in the award the amounts which had actually been earned or, by the exercise of due diligence, could have been earned by the grievants in other employment. It has generally been held that a final award must be certain in its terms or pro-

vide means and data by which it may be made certain by mathematical calculation, and that if it is deficient in this respect it must be vacated since the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. See 3 Am. Jur., *Arbitration-Award,* Secs. 84, 125; 104 A.L.R. 710, 718, 725.

If this rule were given effect in the pending case the award would be set aside, for it is obviously so incomplete that disputes may well arise as to the amounts of back pay which the employer is obliged to make to the discharged workers. We think, however, that the rule forbidding the resubmission of a final award, which was developed when the courts looked with disfavor upon arbitration proceedings, should not be applied today in the settlement of employer-employee disputes. As pointed out in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, Congress has clearly indicated that the arbitration of grievance disputes for the preservation of industrial peace is to be encouraged and the Supreme Court has directed the federal courts to fashion a federal substantive law in accordance with this policy. This may readily be done in the pending case by requiring the parties to take steps to complete the arbitration so that the amounts due the grievants for loss of time will be definitely ascertained. Accordingly, the judgment of the District Court is affirmed, insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but is modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

Judgment modified and case remanded for further proceedings.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Caption Omitted]

JUDGMENT

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Huntington, for further proceedings in accordance with the opinion of this Court; and that the costs on appeal be divided equally between the parties.

MORRIS A. SOPER
United States Circuit Judge.

June 16, 1959.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Caption Omitted]

ORDER

It is ordered that the opinion of the Court, filed herein on June 16, 1959, be modified so as to substitute the following in place of the last sentence of said opinion:

Accordingly, the judgment of the District Court is affirmed insofar as it holds that the Court has jurisdiction to direct the specific performance of the award, but the judgment is modified so as to omit the requirement that the Enterprise Wheel and Car Corporation comply with the award of the Arbitrator insofar as the award requires the reinstatement of the discharged employees; and the judgment is further modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit
MORRIS A. SOPER
United States Circuit Judge
CLEMENT F. HAYNESWORTH, JR.
United States Circuit Judge

Filed:
Aug. 24, 1959

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Caption Omitted]

ORDER

The petition for rehearing in the above entitled case, having been read and considered, it is ordered that the same be and is hereby overruled.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit
MORRIS A. SOPER
United States Circuit Judge
CLEMENT F. HAYNESWORTH, JR.
United States Circuit Judge

Filed:
Aug. 24, 1959

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IN THE

Supreme Court of the United States

October Term, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ENTERPRISE WHEEL AND CAR CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT ENTERPRISE WHEEL AND CAR CORPORATION

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Williston On Contracts (1937 ed.) Sec. 1359, p. 3815 32

IN THE

Supreme Court of the United States

October Term, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ENTERPRISE WHEEL AND CAR CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT ENTERPRISE WHEEL AND CAR CORPORATION

OPINIONS BELOW

The citations for the opinions below have been presented in the Brief for the Petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioner.

QUESTIONS PRESENTED

The United Steelworkers of America (hereinafter called the Union) requested arbitration when eleven employees were terminated on January 18, 1957, while working under the terms of a collective bar-

gaining contract between the Union and Enterprise Wheel and Car Corporation (hereinafter referred to as the Company or as Enterprise). The Company denied that a grievance subject to arbitration existed. The collective bargaining contract of one year's duration expired on April 4, 1957, and was not renewed nor was it succeeded by any subsequent agreement between the parties. Four months after the expiration of the contract the Union sued in District Court for specific performance of the contract, alleging jurisdiction under Section 301 (a) of the Labor Management Relations Act of 1947. Resort to the arbitration provisions of the contract were ordered and compliance was had.

The arbitrator on April 10, 1958, determined that while the employees were guilty of improper conduct, discharge was too severe. It was his decision that they should be reinstated with back pay running from date of discharge, beyond the contract termination date until reinstated, less credit to the Company for a disciplinary suspension period of ten days and less further undetermined amounts the men had received from other employment. The District Court ordered compliance with the decision and award of the arbitrator. The Court of Appeals modified the judgment below. It held that the award was invalid insofar as it ordered reinstatement and back pay beyond the termination date of the contract because the arbitrator had exceeded his authority under the contract. That Court also determined that the award was incomplete and ordered further arbitration as to the amounts earned or which should with diligence have been earned in other employment by the grievants until the date of expiration of the contract.

The Company disagrees with the Union's statement of the "Questions Presented" (Petitioner's Brief, 4) on the ground that such statements beg the issues sought to be raised. When fairly stated, the questions are as follows:

1. Was it proper for the Court of Appeals to consider whether or not the award exceeded the scope of the arbitrator's authority under the contract?

2. Was that portion of the award of the arbitrator ordering reinstatement and back pay for the period after the termination date of the contract invalid by reason of being in excess of the power and authority vested in the arbitrator under the terms, provisions and limitations of the contract entered into on April 5, 1956 and expiring on April 4, 1957?

STATUTE INVOLVED

The pertinent statute, Sec. 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. Sec. 185(a) is set forth in the Brief for the Petitioner at page 5.

STATEMENT

On April 5, 1956, Enterprise Wheel and Car Corporation and United Steelworkers of America entered into a collective bargaining agreement to be in force from April 5, 1956, only until midnight on April 4, 1957 (Ent.R. 1a-18).[1] Section 1 of Article III of

[1] Inasmuch as the Petitioner Union has consolidated its brief in cases Nos. 360, 443 and 538, the same method of record reference will be used as that explained and followed in the Union's brief at page 2, footnote 3. Reference to the record in this case will be preceded by the legend "Ent.R.".

the contract regarding the adjustment of grievances provided for a four-step procedure. In the event a disputed grievance could not be settled by the three-step preliminary procedure, then as the fourth step arbitration could be requested. The portions of Article III pertinent to this discussion follow:

> "Section 1. Should differences arise between the Company and the Union, or its members employed by the Company, as to the meaning and application of the provisions of this Agreement, an earnest effort shall be made to settle such differences immediately, in the following manner:
>
> "Step 1. * * *.
>
> "Step 2. * * *.
>
> "Step 3. * * *.
>
> "Step 4. In the event that the dispute shall not have been satisfactorily settled in accordance with the above, it shall be submitted, at the request of either party, to a panel of three (3) members, one of whom shall be appointed by the Union, one by the Company, and the third member, who shall be an impartial umpire, shall be selected by mutual agreement of the parties. The expenses and salary incident to the services of the umpire shall be paid jointly by the Union and the Company. In the event that a mutually agreeable umpire cannot be selected within ten (10) days after date of notice of desire to appeal to 4th step grievance, either party may request the Federal Mediation and Conciliation Service to furnish the Company and the Union with a list of five (5) qualified and disinterested arbiters. The Com-

pany and the Union shall each reject two of the names thus submitted and the remaining person (or either of the remaining persons) shall be the third member of the panel. The decision of the umpire shall be final and binding on the parties." (Ent.R. 1a-16).

Article VIII of the contract recognized that the right to manage the plant and works and to direct the working forces was exclusively with the Company. However, Article IV, Section 1 limited this managerial right in the following manner:

"In the exercise of its rights and duties as set forth in ARTICLE VIII, Management agrees that a member of the Union shall not be peremptorily discharged from and after the date hereof, but that in all instances in which Management may conclude that an employee's conduct, may justify suspension or discharge, he shall be first suspended. Such initial suspension shall be for not more than five (5) work days. During this period of initial suspension the employee may, if he believes he has been unjustly dealt with, request a hearing and a statement of the offense before the Plant Manager with a member or members of the Grievance Committee present as he may choose. At such hearing, all the facts concerning the case shall be made available to both parties. After such hearing, Management shall conclude whether to convert the suspension into discharge, or extend, sustain, or revoke the suspension. If the suspension is revoked the employee shall be returned to employment and receive full compensation at his regular rate of pay for the time lost. If the suspension is sustained, extended, or converted into discharge, the employee may at any time within five (5) work-

ing days from the filing of Management's decision, allege and present a grievance to be handled in accordance with the procedure of ARTICLE III.

Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." (Ent.R. 1a-17, 18).

On January 18, 1957, the employment of eleven plant employees was terminated because they walked off their jobs by reason of the dispute of another employee with the Company. (Ent.R. 2a-19). At that time the Company had fifty-two employees within the bargaining unit. (Ent.R. 2a-19). The dispute of the fellow employee was forgotten, but the Union claimed that the eleven men who had been terminated had a grievance in accordance with the provision of the contract. The Company denied that a grievance existed, insisting that the men had quit, and refused to reemploy them. (Ent.R. 2a-20, 21). The answer of the Company refusing the reemployment was taken to be the result which would normally have been obtained in the third step of the grievance procedure outlined in Section 1 of Article III of the contract. The next step in such procedure, or Step 4, provided for arbitration procedure. It was the position of the Company that there was no arbitrable issue involved (Ent.R. 2a-9, 12). However, the Company decided in view of an agreement worked out with the Union, to arbitrate the issue under the procedure provided for in the contract at a

hearing set for April 6, 1957. (Ent.R. 2a-9). When the Union failed to carry out the agreement, the Company, on April 6, 1957, refused to arbitrate (Ent.R. 2a-9).

A charge of unfair labor practice was filed by the Union before the National Labor Relations Board on July 3, 1957. (Ent.R. 2a-10; also opinion of Court of Appeals, Ent.R. 43). The charge before the Board alleged a failure to collectively bargain and a violation of Section 8 (a) 3 of the National Labor Relations Act by reason of discrimination against the eleven men previously mentioned who had claimed that they were wrongfully discharged. The Board refused to issue a complaint and the charge was dismissed on August 12, 1957. (Ent.R. 2a-10).

Finally, on August 22, 1957, over four months after the collective bargaining contract had expired, the Union instituted an action in the United States District Court for the Southern District of West Virginia seeking specific performance of the labor contract, particularly the arbitration procedure of ARTICLE III, Section 1, Step 4 of the contract. (Ent.R. 2a-3; also opinion of Court of Appeals, Ent.R. 43).

The District Court ordered specific performance and pursuant to the Court's order the grievance was submitted, under the terms of the contract, to Milton H. Schmidt, for arbitration, the parties agreeing to have only one umpire or arbitrator. (Ent.R. 2a-17). Hearing was held before him on January 3, 1958. (Ent.R. 2a-27). On April 10, 1958, he rendered what he denominated his "Decision and Award of the Arbitrator." His award is now set out:

"AWARD

The grievance is allowed as follows:

1. The discharge of each of the grievants which occurred on January 18, 1957, is set aside and reduced to a disciplinary penalty of ten days suspension for each of the grievants. The ten day period is to be calculated from January 18, 1957.

2. The Company shall reinstate each of the grievants who desire reinstatement to the status of employees with their classifications and seniority status as of the date of their discharge, January 18, 1957.

3. The Company shall reimburse the grievants for all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957.

/s/ Milton H. Schmidt

April 10, 1958" (Ent.R. 2a-23, 24).

As we have noted above, the controlling contract which outlined the arbitration procedure to be followed had expired and terminated on April 4, 1957. After that date all of the employees of the defendant who continued to work were without any contract whatsoever and the terms, conditions and rights of the terminated contract were not extended or renewed to embrace the period after April 4, 1957. (Ent.R. 1a-20; also admission of Union's Counsel, Ent.R. 1a-22). Nevertheless, the award of the arbitrator granted reinstatement of the grievants and

also back pay beyond the contract termination date at regular rates, less certain credits for a disciplinary suspension of ten days and less amounts received from other employment. No date was set upon which the reinstatement was to occur, nor was any finding made as to amounts secured in other employment. Neither was a formula provided for determining how amounts received from other employment were to be set off against the amount of money actually lost by reason of the grievants not working. Enterprise immediately asserted the award to be invalid. Yet this notwithstanding, after the award was made, Enterprise while refusing to reinstate the grievants, did offer to pay them, subject to offsets for earnings in other employment, at their regular rate of pay from the end of the ten day suspension period to April 4, 1957, the expiration date of the contract. This offer was refused. (Ent.R. 1a-21; 2a-39).

Then much later, on November 25, 1958, the Union filed a motion for Enterprise to show cause why it had not complied with the decision and award of the arbitrator, and also asked; if no good cause be shown, for aid in enforcement of the order of the District Court of October 21, 1957, requiring resort to the arbitration procedure of the contract.

Enterprise filed its answer and resistance to the motion to show cause, alleging that the District Court lacked jurisdiction for the reason that the plaintiff Union was seeking to enforce an arbitration award personal to individual grievants and that the original action ordering arbitration had been finalized when the grievance was submitted, the motion to show cause actually being a new action to enforce the award of the arbitrator. In the alternative, to the merits of the

matter, Enterprise asserted that the award was invalid and void because (a) the arbitrator had exceeded the powers vested in him under the terms and limitations of the collective bargaining contract; (b) that the arbitrator had so imperfectly executed his duties that a final and definite award had not been made; and (c) that the award was not in accordance with law. (Ent.R. 2a-26, 27).

Defendant Enterprise further asserted that the collective bargaining contract entered into on April 5, 1956, for one year, had expired on April 4, 1957 and that after the expiration date no contract whatsoever was in effect and the contract had not been extended or renewed in any way. (Ent.R. 2a-28). The affidavit of Oscar Kraehenbuehl, president of the Company, was filed in support of the answer and resistance of the defendant. (Ent.R. 1a-20).

The motion to show cause was heard on December 11, 1958. (Ent.R. 2a-29). The Court ordered the defendant to show cause, to which action the defendant objected on the grounds of lack of jurisdiction, as asserted in its answer and resistance. Without waiver of objections as to jurisdiction, it was ordered that defendant's answer and resistance to the motion to show cause and the affidavit of Oscar Kraehenbuehl in support thereof be treated as the answer of the defendant, Enterprise, to the Court's order to show cause. The matter was then submitted on plaintiff's motion to show cause, the order of the Court for defendant to show cause in conformity with said motion, the defendant's answer and resistance thereto, the affidavit of Oscar Kraehenbuehl in support of the answer and resistance, and the facts agreed by the parties as shown in the pleadings, exhibits and ad-

missions at the hearing. (Ent.R. 2a-29, 30). No testimony of witnesses was taken.

The District Court then held that the defendant Company had failed to show cause for its noncompliance with the decision and award of the arbitrator and rendered judgment on December 16, 1958, ordering forthwith compliance. To all of this defendant objected. (Ent.R. 1a-1, 2).

Timely appeal was taken from this judgment to the United States Court of Appeals for the Fourth Circuit. The questions on appeal presented by the Company were identical to those raised before the District Court.

The Court of Appeals rejected the Company's contention that the District Court lacked jurisdiction over the subject matter of the suit because it was brought by the Union to enforce the personal rights of individual employees. The argument on this point was held not tenable under the decision in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1955).

However, the Court determined that the award of the arbitrator exceeded the power vested in him and went beyond the scope of the arbitration agreement in ordering reinstatement and in ordering back pay for the period after the termination date of the contract. The Court concluded, on the basis of well settled authority, that

> "* * * collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond

its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute." (Opinion of Court of Appeals, Ent.R. 46).

In scrutinizing the contract the Court said:

"The rights which the employees derived from the 1956-57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time. *Meadows v. Radio Industries*, 7 Cir., 222 F.2d 347, 349; *Atchison T. & S. F. R. Co. v. Andrew*, 10 Cir., 211 F.2d 264, 265; *Warden v. Hinds*, 4 Cir., 163 F. 201; 35 Am. Jur., *Master & Servant*, Sec. 19 (pp. 457-58); American Law Institute Restatement, *Agency*, Sec. 442. The same principle is applied where a contract of employment contains a provision allowing termination after a period of notice has been given. In such cases damages for wrongful discharge are limited to the notice period since at the expiration of the period the right of the employer to discharge the employee is unrestricted. See *United Protective Workers v. Ford Motor Co.*, 7 Cir., 223 F. 2d 49, 52; *Odell v. Humble Oil & Refining Co.*, 10 Cir., 201 F.2d 123, 128, cert. den. 345 U. S. 941. It follows that in the pending case the discharged men had no right to damages for loss of time under the contract after its expiration and that the award should be amended so as to eliminate damages based on the subsequent period. This can easily be done without invalidating the entire award." (Opinion of Court of Appeals, Ent.R. 46).

The Court, citing decisions of the Supreme Court, pointed out that the prevailing view is that even if the award exceeds the scope of the arbitration agreement it is not invalid in toto but only so far as it is excessive, if it is of such character that a court can separate the part within from the part beyond the submission. (Opinion of Court of Appeals, Ent.R. 44, 45). In accordance with this concept the valid portion of the award was allowed to stand and the judgment of the District Court was modified so as to admit the requirement that the Company comply with the award of the arbitrator insofar as the award required the reinstatement of the discharged employees and the recovery of wages for loss of time was limited to the period of the contract.

The Court also found that the award was incomplete and indefinite because the arbitrator failed to include in the award the amounts which had actually been earned or by the exercise of due diligence could have been earned by the grievants in other employment. The Court showed that it has generally been held that a final award must be certain in its terms or provide means and data by which it may be made certain by mathematical calculation and that if it is deficient in this respect it must be vacated since the the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. Nevertheless, it was felt that the rule forbidding the resubmission should not be applied in the settlement of employer-employee disputes. In consonance with the Supreme Court's direction in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957) that the federal courts fashion a federal substantive law in accordance with the national policy

favoring arbitration, the Court ordered that the parties complete the arbitration so that the amounts due the grievants for loss of time could be definitely ascertained. (Opinion of the Court of Appeals, Ent.R. 47, 48).

The Union filed a petition for rehearing which was denied. On January 11, 1960 this Court granted certiorari. The Union does not here question the action of the Court of Appeals in ordering that the arbitration be completed so that the amounts earned or which should have by due diligence been earned by the grievants might be definitely ascertained. In the words of counsel for the Union, "The only questions presented by the union's petition for certiorari relate to the action of the court of appeals in reversing the district court's order with respect to reinstatement and back pay subsequent to the termination of the agreement." (Petitioner's Brief, 20).

SUMMARY OF ARGUMENT

I. Section 301 of the Labor Management Relations Act provides legal sanction for collective bargaining agreements. Judicial enforceability of the rights and duties under labor contracts is very much with us and no one would suppose that time will reverse this policy. Whether the result is good or bad, the national policy has brought the courts into grievance arbitration so that "When a motion is filed to compel or stay arbitration or to enforce or vacate an award, the court becomes a superior tribunal and the arbitrator can make only such adjudication as the court permits." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1487 (1959); also see *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

Admittedly, the collective bargaining agreement has characteristics unique to it alone, and salutary effects are to be obtained from having an arbitrator apply an industrial jurisprudence in processing disputes under labor agreements. But there is no reason to jettison wisely developed principles of justice that are as relevant to the enforcement of collective bargaining contracts as they are to contracts concerning other matters. Many contract rules work well in the labor environment. The solution is not the wholesale discarding of the accumulated wisdom of contract law, as some, who deplore any court interference, advocate. Instead, there must be a process of synthesis directed toward the avoidance of inapposite principles.

Although the nature of collective bargaining may call for an arbitrator to apply industrial jurisprudence without hindrance of the literal meaning of contract wording, it is clear that there are definite limits to the arbitrator's function. The limitation imposed will be revealed by the peculiarity of each situation. For example, the phrasing of the arbitration clause itself is important. A narrow clause, similar to the one involved in this case, limited to "interpretation and application" embodies restrictions not present in the more "wide-open" clause referring to "any dispute, difference, disagreement or controversy of any nature or character." Thus, the "imperative which requires a body of 'industrial jurisprudence' within the general area marked off for joint government has no place in deciding what area has been marked off." Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1506 (1959). No obligation which is outside of the contract may be imposed on the employer by the arbitration. The delineation

of the area marked off involves an examination of the bargain. The problem then is not one peculiar to the developing "industrial jurisprudence" of the national labor complex; instead it is one to be solved by reference to generally recognized concepts of justice and fair play which prohibit the remaking of a bargain fairly struck between the parties.

In the general arbitration field the arbitrator has long been forbidden to remake the contract or to impose additional burdens. Nothing is better settled in federal or state law than the principle which holds that an arbitrator cannot go outside the authority of the agreement. E.g. see *United States v. Farragut*, 22 Wall. 406 (1874). This question is for determination by the Court, and even the Union concedes at page 71 of its brief that this rule applies to a labor arbitration. The use of phraseology in the agreement to the effect that the decision of the arbitrator shall be final and binding applies only to matters encompassed by the agreement and does not prevent court inquiry as to whether authority was exceeded. *Arlington Towers Corp. v. John McShain*, 150 F. Supp. 904, 923 (DC D.C. 1956); *U. S. v. Farragut*, 22 Wall. 406 (1874).

In addition to the general law, the specific use in the case at bar of the more narrow type grievance clause covering differences as to "meaning and application" imposed a limit on the power of the arbitrator. He was not, through it, at liberty to determine his own jurisdiction. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-10. Consequently, inquiry by the Court of Appeals as to whether the arbitrator exceeded his authority in making his award, was proper, such action being entirely consistent with national labor policy.

II. In this case the arbitrator exceeded his authority and by his award improperly modified and enlarged the provisions of the contract by erroneously granting the eleven grievants involved, back pay and reinstatement beyond the expiration date of the contract.

The bargaining contract was of one year's duration. After it expired on April 4, 1957, it was not renewed and no new contract of any kind has yet been entered into. All rights arose from the contract and protection of these rights terminated at its expiration. Those who remained in the employment of the company after that date held no rights under the contract.

Collective bargaining agreements do not create a permanent status, give definite tenure or extend rights created and arising under the contract beyond its life, when it has terminated. See for example the widely cited case of *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F. 2d 509 (CCA 5, 1941), cert. den. 314 U. S. 656. Also, it is beyond question that damages for wrongful discharge under a collective bargaining contract are limited to the period ending with the earliest date on which the employee could lawfully be discharged. Williston on Contracts (1937 ed.) Sec. 1359, p. 3815; *United Protective Workers Local No. 2 v. Ford Motor Co.*, 223 F. 2d 49 (CA 7, 1955).

Applying these concepts it is seen that the grievants were entitled to back pay only from date of discharge until the expiration date of the contract. This result is made all the more obvious by Union counsel's admission that after the contract expired, the Company was free to reinstate the men and fire them immediately afterwards, so long as an unfair labor practice was not committed. (Ent.R. 1a-22).

Moreover, the arbitrator, himself, did not rely on any interpretation of the contract for that portion of the award running beyond the termination date of the contract. He based his decision on an erroneous idea that after the contract had expired, the law offered protection against termination without cause. (Ent.R. 2a-23). As a result, the award was based on matters outside the scope of his authority under the contract, and did not depend upon his interpretation of the words of the contract.

Regardless of Union criticism, the cases and concepts briefly discussed in this summary were applicable and correctly applied by the court below. No case from a state or federal court has been brought forth by the Union to show otherwise. The Court of Appeals has not in any manner attempted to usurp the function of the arbitrator nor has it inquired into the merits of the controversy to determine whether discharge was justified. The remedy, or, as it may more appropriately be denoted, the damages awarded by the arbitrator exceeded his authority, but the court below has endeavored to rectify this, while yet showing the greatest deference for the arbitrator's award by separating and preserving its valid portions. This was done even in the face of the Company's contention that the entire award was invalid.

III. The decision of the Court of Appeals does not conflict with the decision of the National Labor Relations Board in *Local No. 611, International Chemical Workers*, 123 N.L.R.B. No. 182 (1959), and the Sixth Circuit in *N.L.R.B. v. Knight Morley Corp.*, 251 F. 2d 753 (CA 6, 1958) or with the federal labor policy. The Union imagines that because of the holdings of these cases, it is caught in a dilemma in that if it seeks

to discuss the discharges outside the grievance procedure to the point of deadlock, it is guilty of an unfair labor practice while, if it invokes arbitration, the employer can with impunity refuse to comply with the award. This is not true. The employer does not escape with impunity from a valid award. The Company in this case is being required *to pay a substantial sum of money to the grievants.* Furthermore, in the *Knight Morley* and the *Chemical Workers* cases the underlying concern was the same as in this case—contract rights were protected in order to give substance to the collective bargaining process. All of these cases implement the policy of Congress "which placed sanctions behind agreements to arbitrate grievance disputes * * * ." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, at 456 (1957).

The entire matter is subject to regulation between the parties by their contract. If a union allows a contract to be terminated or does not provide for a contract of longer duration or fails to provide for contingencies, it cannot complain that federal policy favoring arbitration is thwarted. If additional or continuing rights are desired, the simple solution for the union is to provide in the contract for the disposition of grievances which are pending when the contract expires. Contrary to the Union's suggestion, it cannot be assumed that the decision of the Court of Appeals will encourage an employer to delay arbitration deliberately until the expiration date arrives, because he will be allowing great damages to accrue during the period the contract is still in effect. It is difficult to see, in the face of such severe economic sanctions, how the arbitration procedure will be inhibited.

IV. The reasoning of the Court of Appeals is not inconsistent with *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968 (1959). That case is not remotely similar to the instant case on the facts, does not involve arbitration or a contract, and is permeated with policy considerations regarding procedural rights in national security investigations within an administrative department of the national government. *Vitarelli* is of limited application to its own peculiar and unusual factual circumstances.

ARGUMENT

I. Inquiry By The Court Was Proper To Determine Whether The Arbitrator Had Exceeded His Authority Vested In Him Under The Terms Of The Collective Bargaining Contract And Such Action Was Entirely Consistent With The National Labor Policy.

The philosophic premise underlying the Union's argument in this case is a self-serving echo of that current of thought which maintains that the law should stay out of grievance arbitration. See, e.g., Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955). Such thinking when carried to its ultimate fruition demands complete judicial abnegation. However, the national labor policy has now been firmly channeled in other directions.

After rejecting the idea of committing the supervision of the labor contract to the expertness of the National Labor Relations Board by making the breach of such a contract an unfair labor practice, the Congress that passed Taft-Hartley gave a general grant of jurisdiction to the federal courts to interpret and

See Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947).

construe labor contracts.[3] Section 301 of the Labor Management Relations Act provides legal sanction for collective bargaining agreements and while certain labor specialists may think that the courts are ill-suited for solving the problem, Congress has committed the national policy to a different view. Judicial enforceability of the rights and duties under labor contracts is very much with us and it is not to be supposed that time will reverse this policy. Whether the result is good or bad, the national policy has brought the courts into grievance arbitration so that "When a motion is filed to compel or stay arbitration or to enforce or vacate an award, the court becomes a superior tribunal and the arbitrator can make only such adjudication as the court permits." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1487 (1959); also see *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

Admittedly, the collective bargaining agreement has characteristics all its own. And it may well be beneficial for arbitrators familiar with industrial processes to create and apply an industrial jurisprudence in processing disputes under such agreements. But while the collective bargaining contract has many unique facets, it is not, as many in the arbitration fraternity would theorize, completely and utterly unlike ordinary contracts to such an extent that it is subject to special rules "which only members of the cult can fully understand."[4] This type thinking is

[3] See Wellington, *Judge Magruder And The Labor Contract*, 72 Harv. L. Rev. 1268, 1298 (1959).

[4] These are the words of Professor Cox who deplores this authoritarian approach to the problem although admitting that there are many points of contrast between labor agreements and other types of contracts. See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1489 (1959).

manifested by the Union in its brief at page 42, where it is said in reference to labor arbitration that

> "It is not necessary that they [the courts] become familiar with it [the institution of arbitration], but it is necessary that they respect it and defer to it if it is to continue to operate effectively as Congress intended it should, as a peaceful method of solving industrial disputes."

In warning of the danger of overstressing difference between the collective bargaining contract and so-called ordinary contracts, Professor Cox has admonished that

> "Often the difference is important, but the time has passed since we could simply erect a 'no trespassing sign' and separate industrial relations from the law. The law has moved into the sphere of grievance adjustment and contract administration. Labor relations has spilled over into judicial territory. Labor, management, and arbitrators must recognize that the law often expresses ideals and needs of society which limit their freedom of action. The law of contracts often embodies these ideals. It may also embody lessons of experience entirely applicable to collective bargaining agreements. Conversely the law can satisfy the needs of the industrial world only if there is a strong infusion of many of the ideas and conventions heretofore unknown to law but appropriate to group action, which have gained acceptance in the world of labor relations. It is not enough to halt after taking the important first step of emphasizing the unique aspects of collective bargaining agreements." Cox,

The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 5 (1958).

In his dissent in *Lewis v. Benedict Coal Corp.*, 80 S.Ct. 489, 496, 498 (1958) Justice Frankfurter has voiced much the same sentiment and has stated that:

> "* * * There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements."

The fear of Justice Frankfurter and of Professor Cox is that simply because it can be shown that collective bargaining agreements have characteristics which bar the application of some familiar contract principles, there is a great danger that those who are well grounded in collective bargaining will demand a complete discarding of contract law and a creation of a new law of collective bargaining agreements. Of course, this would be extremely unwise. Many legal doctrines are based upon time-tested notions of fairness and sound public policy. No one would deny that there is present a wide difference in the rules, precepts and concepts which are applied to different kinds of contracts within the commercial and private field as distinguished from the labor contract. Certainly there is as much difference between a long-term requirements contract and the problems involved in the sale of real property or a contract to build a house as there is between collective bargaining contracts and what the labor specialist denotes "ordinary

contracts." It is a foolish waste to have to climb the ladder all over again "just because the suggested principles were developed in other contexts." As Professor Cox states:

> "* * * Should not our attitude be one of inquiry into the pertinency of the reasons for each contract rule? Some contract rules stand up well in the new environment * * *. They appear to be those which derive from functional aspects of commercial contracts that are also important characteristics of collective bargaining agreements. The doctrine of failure of consideration and the element of 'bargain' or 'exchange' furnish a prime illustration." Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 15 (1958).

The solution to the problem lies not in the wholesale discarding of the accumulated wisdom of contract law. It must be found in conscious selectivity directed toward the avoidance of the application of inapposite principles. This process of synthesis is not a new one and is one which has long been employed in the development of the law. Requirements contracts, for example, require a different handling than a trust indenture and yet there are general concepts extremely useful and of universal application to both types. Just as certain business practices have crystallized into precepts of commercial law, the "law of the shop" has its role to play in formulating an industrial jurisprudence.

See Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 14 (1958) for a discussion of this thesis.

Even though the nature of a collective bargaining agreement may call for an arbitrator to apply industrial jurisprudence to settle a grievance without hindrance of the bare or literal meaning of contract wording, it is clear that there are and must be definite limits to the arbitrator's function. These limitations will be revealed by the particular situation. For example, the phrasing of the arbitration clause is of great importance. A narrow arbitration clause limited to "interpretation and application," similar to that present in this case, embodies restrictions upon the arbitrator not present when a wide-open clause is used allowing arbitration of "any dispute, difference, disagreement or controversy of any nature or character." The arbitrator, therefore, is not free to utilize a complete legal system to determine the rights and duties existing between the parties:

> "Whatever the indicia, however, they must be found in the relationship created by the particular contract, and no obligation which is outside of the context of the contract may be imposed upon a company by an arbitrator. In this sense, the management-rights theory seems sound. *The imperative which requires a body of 'industrial jurisprudence' within the general area marked off for joint government has no place in deciding what area has been marked off.*" (Emphasis added). Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1506 (1959).

Accordingly, in deciding the scope of authority of the arbitrator—that is whether an obligation is within or without the context of the contract—the uniqueness of the industrial complex has no controlling force.

Special exegesis from the labor arbitration academy is not necessary because the area under consideration is outside the realm wherein the so-called exclusive knowledge of the "law of the shop" is applicable. The delineation of the area which has been marked off by the parties in the contract for "joint government" involves an examination of the obligations bargained for.

At this point, the functional aspects so familiar to commercial contracts are equally characteristic of the collective bargaining contract. The problem is not then one peculiar to a body of industrial jurisprudence; instead, it is one to be solved by reference to generally recognized contract concepts of justice and fair play which prohibit the remaking of a bargain fairly struck between the parties.[6]

In the general arbitration field the arbitrator has long been forbidden to remake the contract or reimpose additional burdens not contemplated by the parties. Nothing is better settled in federal or state law than that principle which holds that an arbitrator cannot go outside of the authority afforded him under the contract of submission. State and federal common law decisions and decisions under the Federal Arbitration Act clearly buttress this conclusion and aptly demonstrate the universal lack of discord on the point. *United States v. Farragut*, 22 Wall. 406 (1874); *Arlington Towers Corp. v. John McShain*, 150 F.Supp. 904, 923 (DC D.C. 1957); *Texoma Natural Gas Co. v.*

[6] For a general discussion of the principle which prohibits the modification or the creation of a new or different agreement from that contracted for by the parties see 12 Am.Jur., Contracts, Sec. 228, wherein voluminous citation to the decisions of this Court is made.

Oil Workers International Union, Local 463, 58 F.Supp. 132 (DC Tex. 1943), aff. 146 F.2d 62, cert. den. 324 U.S. 872, rehearing den. 325 U.S. 893; *Simmons v. Simmons*, 85 W. Va. 25, 100 S.E. 743 (1919). In 3 Am.Jur., *Arbitration and Award*, Sec. 41, it is pointed out that:

> "* * * It is for the court, not the arbitrators, to decide whether the latter have exceeded their powers under the submission or have refused to exercise them, for since the submission is the foundation of the arbitrators' jurisdiction, their construction of it with respect to their own powers, unless clearly pursuant to its terms, is not conclusive."

Under the Federal Arbitration Act, in *Application of States Marine Corp. of Delaware*, 127 F.Supp. 943, 944 (DC N.Y. 1954) it was held that if arbitrators determine a matter not within the terms of the arbitration agreement or fail to determine matters within the terms of such agreement, they have "exceeded or imperfectly executed their jurisdiction, and their award should be vacated." Again, in *Texoma Natural Gas Co. v. Oil Workers International Union, Local 463*, 58 F.Supp. 132, 146 (DC Tex. 1943), aff. 146 F.2d 62, cert. den. 324 U.S. 872, rehearing den. 325 U.S. 893, in a case involving labor arbitration, it is pointed out:

> "* * * If the matters determined are not within the terms of the submission (i.e. within the arbitration provisions of the contract), or the arbitrators in making their award go beyond the contemplation of the parties, as reflected in the contract, they

obviously exceed their jurisdiction, and their award may be set aside in an appropriate proceeding."

The point is so universally accepted that the Union in the instant case concedes at page 71 of its brief that in a labor arbitration a court is empowered to reverse an arbitration decision when the arbitrator exceeds his jurisdiction. Even the case of *Burchell v. Marsh*, 17 How. 344, 349 (1855) cited by the Union explicitly proclaims that the award must be within the submission in order to preclude court review.

The fact that the arbitration contract contains language to the effect that the decision of the arbitrator shall be final and binding, as did the contract in this case, does not at all affect the right to question whether the award exceeds the arbitrator's authority. The award can be conclusive only as to those things properly submitted; this is all that is meant when it is said that the arbitrator's decision shall be final and binding. The phraseology means merely that as to all things validly submitted, the parties are precluded, a self-imposed *res judicata* so to speak. This commonly used language does not imply that the arbitrator has carte blanche to remake and reconstitute the agreement.

In *Arlington Towers Corp. v. John McShain*, 150 F.Supp. 904, 923 (DC D.C. 1957) in a labor arbitration involving the Arbitration Act it was stated:

> "*Although the Arbitration Agreement specifically provides that the award of the Arbitrator shall be final and binding, that neither party will contest such findings and that neither party will appeal from any por-*

> *tion of the final judgment, there appears to be no doubt but that the plaintiffs are within their rights in challenging the Arbitration award, particularly on the grounds that the Arbitrator exceeded his authority* and upon the grounds of fraud, bias and prejudice." (Italics ours).

Likewise the Supreme Court itself long ago held that expressions in the submission agreement saying that awards shall be final and conclusive cannot operate to give effect to an award which does not conform to the submission. *U. S. v. Farragut*, 22 Wall. 406 (1874).

Consequently, in the instant case the arbitrator was not free to remake the contract. He was circumscribed and limited to those matters and things which are within the scope of the contract and the Court had the power as well as the duty to examine the award to see if it were in excess of the contract terms.

Nevertheless, the Union now argues that since the arbitrator had jurisdiction to interpret and apply the agreement, "his decision as to what the agreement requires the employer to do, if fairly reached, should not be reviewable by any court." (Petitioner's Brief, 71). In advocating this bootstrap doctrine the Union has overlooked the fact that the clause with which we are concerned is of a comparatively narrow type. The grievance clause extends only to differences "as to the meaning and application of the provisions of this agreement." (Ent.R. 2a-4.) It does not grant unlimited authority to the arbitrator. Professor Cox has distinguished between a clause of this nature and a more wide-open clause by saying:

"* * * Even though an arbitration clause covering only 'disputes concerning the interpretation and application' of the collective agreement cannot mean barely the translation of words, it must impose some limit. The phrasing of the arbitration clause is often an important issue in collective bargaining. Experienced negotiators are thoroughly aware of their ability to choose between the comparatively narrow clause noted above and a wide-open undertaking to arbitrate 'any dispute, difference, disagreement or controversy of any nature or character' which may arise during the term of the agreement. When the former clause is selected, the company believes that a limit has been imposed upon the power of the arbitrator. The union would also acknowledge that his authority is narrower than if the union had been able to persuade the company to accept a wide-open clause. * * *" Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1500 (1959).

Cox is persuaded that the conventional clause like the one now before the Court is not an agreement which allows an arbitrator to determine his own jurisdiction. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959). His remarks upon the subject are logical and compelling:

"Nevertheless, I am persuaded that the conventional arbitration clause is not an agreement which allows an arbitrator to interpret its meaning, thereby determining his own jurisdiction. The contrast between the wide-open clause and the conventional phraseology is too plain to put down to inadvertence. The apparent purpose is to confine the power of the arbitrator. Apparently

> the parties choose it because one party, usually the employer, distrusts arbitration at least to the point of insisting upon the inclusion of some safeguard against the arbitrator's imposition of significant obligations not contemplated by the agreement and quite beyond its scope. The clause does not tell what the arbitrator should not do. It tells what he cannot do. The protection sought by the employer would be drastically reduced by a construction which gave the arbitrator unlimited power to determine his own jurisdiction and merely warned against its exercise, for as a practical matter he would then have the power to impose obligations outside the contract limited only by his understanding and conscience. We can give effect to the underlying purpose only by excepting the interpretation of the arbitration clause from the general power to interpret, * * *." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-1510 (1959).

This forcibly demonstrates that the arbitrator did not have, under the language of the agreement, the jurisdiction to exclusively determine his own jurisdiction. He could not pull himself up by his own bootstraps.

II. The Arbitrator Exceeded His Authority In Allowing Back Pay And Reinstatement Beyond The Contract Termination Date And The Fourth Circuit Did Not Err In Holding That Portion Of The Award Invalid.

Under this point of argument we propose to discuss first the principles which disclose that the arbitrator did exceed his authority, and then to refute the Union's argument that the Court of Appeals relied upon inapplicable precedents to set aside the invalid portion of the award.

A. The arbitrator exceeded the authority vested in him by the contract.

In this case the arbitrator exceeded his authority and by his award improperly modified and enlarged upon the provisions of the contract by erroneously granting the eleven grievants back pay and reinstatement on a theory that they had employment security rights continuing even beyond the expiration of the collective bargaining contract. The Court of Appeals so held and that portion of the award going beyond the termination date was declared to be invalid. Our position is that since the contract had terminated at the time of arbitration, only monetary compensation for loss of pay from the date of discharge on January 18, 1957, to April 4, 1957, the termination date of the contract, could be awarded. All rights of the grievants arose from the contract and they were guaranteed protection from discharge without cause only until April 4, 1957.

The particular grievance involved in the arbitration occurred on January 18, 1957. The bargaining contract under which arbitration was had, by its very terms was of one year's duration. (Ent.R. 1a-18). It expired on April 4, 1957, at midnight. It had no renewal clause and was not renewed. After April 4, 1957, there was no agreement of any kind between the Company and the employees or their Union. (Ent.R. 1a-20, 21, 22; also "Decision and Award" of the arbitrator Ent.R. 2a-18).

It is beyond question that damages for wrongful discharge under a collective bargaining contract are limited to the period ending with the earliest date on which the employee could lawfully be discharged. See Williston On Contracts (1937 ed.) Sec. 1359, p. 3815;

United Protective Workers Local No. 2 v. Ford Motor Co., 223 F. 2d 49 (CA 7, 1955); *Odell v. Humble Oil & Refining Co.*, 201 F. 2d 123 (CA 10, 1953) and cases cited therein.

In *United Protective Workers Local No. 2 v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955) the Union brought suit for *reinstatement and back pay* for Joseph Orloski, claiming that a collective bargaining agreement prevented his discharge except for cause. On June 21, 1945, the company had signed a group annuity contract for the benefit of those of its employees who received a certain salary and who chose to participate in the plan. Retirement age was defined as 65 with optional earlier retirement under certain specified conditions. On September 26, 1947, after a wage increase, Orloski elected to enter the plan and signed an acceptance and salary deduction authority. On April 24, 1949, Orloski was retired against his will and was thereafter paid $20.00 per month under the annuity plan. Orloski never at any time knew of the company's alleged policy of compulsory retirement.

The District Court dismissed the complaint for failure to state a cause of action. On appeal the Court of Appeals reversed and remanded the case for answer. It held that under the collective bargaining contract then in effect the company did not have the right to retire the plaintiff without his consent, but that since he had an adequate remedy at law he could not have specific performance and must rely on recovery of damages. On remand to the District Court, the Court awarded damages to Orloski, but Orloski appealed to contest the measure of damages applied. In sustaining the lower court the Court of Appeals commented at 223 F 2d 52:

"In setting the amount of damages, the District Court awarded Orloski the wages he would have made from April 25, 1949, the date of his retirement, until December 1, 1950. On March 1, 1950, a new retirement and annuity plan, to which Ford and the Union had both agreed, went into effect. The parties agree that under its provisions Orloski could have been retired on December 1, 1950. The plan also provided that with the permission of a special company board an employee could be retained until age 68.

"If Orloski had not been retired on April 25, 1949, he would have come under this new retirement plan. The trial judge had to determine when, under the new plan, Orloski would have been retired. He determined, reasonably we think, that Orloski would have been retired on the regular retirement date rather than the exception. Although there is no specific evidence on either side of the question, we feel that the trial judge's choice was the more reasonable of the two and was supported by the record as a whole.

"The general rule which the trial judge followed is stated in Williston, On Contracts (1937 ed.) Sec. 1359, at page 3815: '*It is not uncommon for contracts of employment to contain a provision for termination upon a certain period of notice. In such a case, the damages are limited to the nearest date at which the employer could rightfully exercise his privilege.*'" (Italics ours.)

From this it will be seen that lost wages can only be awarded to the earliest possible date on which the contract could be legally terminated. Since Orloski could have been legally retired and discharged from em-

ployment on December 1, 1950, lost wages for wrongful discharge must run only until that time regardless of the possibility that his employment could have run for additional years under the exception allowing employees to be retained under certain circumstances until age 68. The same principle applies here. In our case we find that the earliest possible date upon which the grievants could have been rightfully terminated, assuming good conduct on their part, was April 4, 1957, the expiration date of the contract. Therefore, loss of wages can run only until that date.

In *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (CA 10, 1953), cert. den. 345 U.S. 941, it was held that where an employment contract provided that it could be terminated by either party by giving thirty days' notice in writing, one month's salary was the maximum amount recoverable by discharged employees for alleged breach of contract by employer in discharging employee. The plaintiffs in the action each sought judgment for $100,000 and punitive damages of $100,000. The District Court dismissed the cause of action because it appeared from the complaint that the maximum possible recovery of each discharged employee was less than the $3,000 jurisdictional amount. At 201 F.2d 123, 128, the Court said:

> "The contract with the employees' bargaining representative provided that it could be terminated by either party by giving thirty days notice in writing. *Where a contract of employment expressly empowers an employer to terminate the contract upon giving notice, recovery for wrongful breach is limited to the notice period.* The complaint alleged that each appellant was receiving a salary which together with other valuable incidents to his job was of the value of $500

per month. Under the provisions of the contract, one month's salary was the maximum amount recoverable for breach of the contract." (Italics ours).

It is manifest that no recovery can be had for damages for unlawful discharge arising after the termination date of the contract or after the date when the contract could have been effectively terminated by the employer. Collective bargaining agreements do not create a permanent status, give indefinite tenure or extend rights created and arising under the contract beyond its life when it has terminated. See *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509, 515 (CCA 5, 1941), cert. den. 314 U.S. 565; *Elder v. N.Y.C. Ry. Co.*, 152 F.2d 361 (CA 6, 1945); *Cardenas v. Wilson & Co.*, 180 F.2d 828 (CA 10, 1950); *Shiels v. Baltimore and Ohio Railroad Co.*, 154 F.Supp. 917, at 925 (DC Ind. 1957) and cases therein cited; *Walker v. Pennsylvania-Reading Seashore Lines*, 142 N.J. Eq. 588, 61 A.2d 453, 462 (N.J. 1948).

In *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509 (CCA 5, 1941), cert. den. 314 U.S. 565 plaintiff Union brought suit on behalf of certain of its members under authority of the National Railway Labor Act to enforce a favorable award of the National Railroad Adjustment Board. The claim in general was that the defendant Railway Company had wrongfully deprived the employees of seniority rights under a collective bargaining agreement effective August 1, 1929, by furloughing them from service upon the untrue pretext that a reduction in force was then necessary or by denying their return to service when in fact defendant was actually hiring new men or advancing men junior in seniority. The agreement of August 1, 1929, set up the rules and working condi-

tions under which all the shop craft employees of the defendant should perform their services. Under the agreement, these employees were accorded certain legal rights of seniority, among which was the right that if employees should be furloughed from service due to a reduction in force, they should be restored to service in the event of an increase in forces in order of their seniority. In this agreement no restriction was placed upon the length of time during which furloughed employees might retain their right to reinstatement thereunder. This agreement was terminated on February 7, 1931. See *System Federation No. 59 of Railway Employees v. Louisiana & A. Ry. Co.*, 30 F.Supp. 909 (DC La., 1940). It would appear that from 1930 until resort was had to the Railway Labor Board the Railway Company refused to confer with the union regarding the grievances. 119 F.2d 509 at 513, footnote 9.

Company rules of February 9, 1931, were then substituted in lieu of the provisions of the contract. Later, in 1937, another agreement covering the rules and working conditions of the employees was entered into between the Union and the Railway Company. While there were claims for furloughing occurring after February 7, 1931, we need only be concerned with the employees who claimed illegal furlough between August 1, 1929 and February 7, 1931. Their situation is analogous to that of the eleven grievants in the instant case.

The Court in considering their claims stated at 119 F.2d 509, 515 that:

> "The only question with which we are here concerned is whether the seniority rights claimed, arise out, and exist, because of, the

1929 contract, and persist during and only during its term, or whether they indefinitely continue to exist after it has been abrogated, and the relations of employer and employee are no longer fixed and being carried on under that contract, but for many years under rules, promulgated by the company, and later under a contract between the company and the union which affirms that it 'covers all understandings now in effect.'

"*On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions.* Authorities, supra. The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term. After the termination of the 1929 contract, those who remained in the employ of the defendant, or came into it afterwards, held their tenure and such rights as they had, not under the 1929 contract, but at first under the company rules and later under the 1937 contract, and none of them can claim rights contrary thereto.

"*The rights accorded plaintiff and its members under the 1929 contract are clear. Under it, any of the persons named who were furloughed during its continuance had a right, during the life of the contract, to apply for reinstatement under its terms. After its abrogation that right was lost and reinstatement could not be claimed under its terms,* but only under the terms of the company rules until 1937, and after 1937, under the terms of the 1937 contract.

"If, on February 7, 1931, when the 1929 contract was abrogated, any of those furloughed before that date, had decided not to return to work, they could have stood upon their claim, that they had been furloughed contrary to the terms of their contract, and sought reparation for the time lost while the contract was still in force. *They could not, because the contract had been breached as to them, claim that the breach had extended its life, so as to entitle them to time lost, and to reinstatement, after its abrogation.* No claim ever has been made for damages up to the time of the contract's abrogation. No such claim is made now. The claim as made before and now is not for loss of wages up to the abrogation of the 1929 contract. It is for loss of wages up to the present time, together with the right to displace and take the place of those who working for the company, under the 1931 rules, were working for it when the 1937 contract was made, and are working for it now under the terms of that contract." (Italics ours).

This language shows great similarity to the instant case. Here, the contract and its terms were to endure from April 5, 1956 through April 4, 1957. The eleven grievants involved were found by the arbitrator to have been wrongfully discharged on January 18, 1957, even though they were guilty of sufficient misconduct to be penalized with a ten-day suspension. The company was ordered to reinstate each of the grievants who so desired reinstatement, with the same classification and seniority status as of the date of discharge, and the company was ordered to reimburse grievants for all time actually lost from work which they would otherwise have had from the com-

pany, less the ten-day suspension and less amounts acquired from other employment since ten days after January 18, 1957.

At this point it should be noted that the arbitrator by his own reasoning did not rely on the language of the contract to support that portion of the award which the Court of Appeals held to be invalid. In this connection the Union, at page 69 of its brief, erroneously asserts that the Company argued to the arbitrator that the termination provision of the contract prevented reinstatement after the expiration date of the contract. This is not so. The Company merely asserted that since the contract had expired, the entire matter was moot and therefore not subject to arbitration. (Ent.R. 2a-18.) Nothing, however, was mentioned concerning whether the language of the contract could be interpreted to extend the right of reinstatement beyond expiration. In attempting to refute the contention of mootness the arbitrator pointed out that the agreement was in effect some months after the grievance arose. Then at that juncture he departed from the terms of the contract entirely, saying that the status of the grievant employees

> "* * * continued during the subsequent period of negotiations for contract renewal. They were protected by the law from improper discrimination or termination of their employment without good cause. Their grievance presented a continuing controversy as to rights of employment, reinstatement and back pay." (Ent.R. 2a-23).

Plainly, the arbitrator has gone beyond the scope of the contract in making his award. He has exceeded the authority vested in him by the contract itself. This

contention of continuing rights advanced by the arbitrator is the same one which was repudiated by the Court in *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509 (CCA 5, 1941), cert. den. 314 U.S. 565. The rights of the parties herein were fixed by the contract and ended when it ended. After its termination, those who remained in the employ of the defendant Enterprise or who were hired afterwards held no rights under the contract because it was not extended or renewed nor was there any other collective bargaining contract or agreement entered into between the Company and the plaintiff Union. (Ent.R. 1a-20); also admission of Union Counsel, Transcript of Hearing of December 11, 1958 (Ent.R. 1a-22).

From the portion of the decision of the arbitrator quoted above, the arbitrator mistakenly states that the grievants even after the expiration of the contract were protected by law from improper discrimination or termination of their employment without cause. Such is not the law.

Under the Labor Management Relations Act employers may not discriminate in hire or tenure of employment or any term or condition of employment if the discrimination is intended to encourage or discourage membership in a labor organization, but it is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the act. See *National Labor Relations Board v. Standard Coil Products Co.*, 224 F.2d 465 (CA 5, 1955); also *United States Steel Corporation v. Nichols*, 229 F.2d 396, at 399 (CA 6, 1956), cert. denied 351 U.S. 950 (1956).

There is no question here involved of discrimination because of Union activity. The fact that the arbitrator himself found that the conduct of the grievants merited disciplinary action in the form of a ten-day suspension readily demonstrates that the defendant was not attempting to discriminate because of bias toward union activities, nor has the arbitrator even suggested such a thing. Even if there were a question of discrimination because of union activity, the employees' rights in this regard would be enforceable only in an unfair labor practice charge before the National Labor Relations Board and not in a proceeding of this type. *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183, 190 (CCA 4, 1948).

An unfair labor charge concerning the eleven grievants here w: rought before the Board on July 3, 1957, but the Board refused to issue a complaint. (Ent.R. 2a-10, 43). Also the six months statute of limitations provided by Sec. 10(b) of the National Labor Relations Act, 29 USCA has long since barred any additional charge of this type.

In any event, the protection of the Act had no application in the instant case and the arbitrator was to be governed and guided by the contract itself. The relationship was created by the contract and any guarantee that the employer should not discharge except for cause flowed from the contract and not from any statutory or common law. While a dispute arising during the life of a contract providing for arbitration may be arbitrated after that contract expires, see *Lane v. Endicott-Johnson*, 80 N.Y.S.2d 639 (1948) aff. 87 N.E. 2d 450 (1949); also *Item Company v. New Orleans Newspaper Guild*, 256 F.2d 855 (CA 5, 1958), such a proposition does no harm to the argument we

advance here as it is universally recognized that a suit for breach of contract may be brought after the contract has expired. Cases like the *Endicott* and *Item* cases merely hold that arbitration may be resorted to and they have nothing to do whatsoever with whether the award may go beyond the term of the contract.

In asserting that the award cannot be reviewed, the Union has confused the finding of fact by the arbitrator with the limitation imposed on him by the agreement delineating his authority. The Court of Appeals did not in any manner attempt to review or upset the arbitrator's final determination as to whether the discharge was justified and neither has the Company questioned this determination. The merits of the controversy were not entered into and the Court did not take it upon itself to make a *de novo* finding. The Court merely determined that the agreement did not afford authority for the remedy or damage the arbitrator attempted to impose by his award.

B. The precedents upon which the Court of Appeals relied are applicable to the case at bar.

The Union now argues that the precedents established by the cases discussed above and applied by the Court of Appeals are inapplicable. This is so, says the Union, since they are not on all fours and because they do not involve the question of remedy, but consider only whether there was a violation of the contract in the first instance. Our answer to this first criticism is that the principles enunciated by the cases are not weakened by the fact that they are not on all fours with this case. The cases cited by the Court clearly state and recognize the principles relied on and under their factual circumstances conclusively show that

rights of employees under a collective bargaining contract terminate when the contract is terminated. To show that the second contention as to inapplicability is equally baseless we need only to refer to such cases as *System Federation No. 59 v. Louisiana & A. Ry.*, 119 F.2d 509 (CCA 5, 1941); *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955); and *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (CA 10, 1953), cert. den. 345 U.S. 341 (1953). These cases were very much concerned with the question of remedy.

The Union maintains that *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509 (CCA 5, 1941), cert. den. 314 U.S. 565 (1941) does not apply, and that "the question was whether employees who were furloughed during or after the term of an agreement can gain reinstatement on the basis of their seniority after the agreement expires." (See Petitioner's Brief, 77). Of course the Union omitted the word "wrongfully" when speaking of the furlough during the term of the contract. The Court *held* that the right of reinstatement expired with the expiration of the agreement, and the question certainly was whether reinstatement after the expiration of the agreement was a proper remedy for the violation of rights during the term of the agreement. The case is not distinguishable from the present case and has not been distinguished in the Union's brief.

Finally, the Court's reliance on *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955) and on *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (CA 10, 1953), cert. den. 345 U.S. 941 (1953) is attacked as being improper. These cases recognize and discuss the rule that where a contract of employment

contains a provision for termination after a period of notice, damage for wrongful discharge will be limited to the notice period. The Union declares that the wrong committed when an employee is wrongfully discharged under an agreement containing a notice provision is not the discharge itself, but the failure to give notice. The Union reasons that the result obtained in such cases is opposite from that which would be obtained in the instant case. In the instant case, says the Union, it must be assumed that the employment would be continued after the contract has expired. In a case where the contract had a notice period, it would, in the words of the Union, "not be realistic to assume that if the wrong had not been committed the employee would not have been discharged; the natural assumption is that he would still have been discharged but with proper notice." (Petitioner's Brief, 80). We fail to comprehend the distinction. It would seem just as logical and realistic to say that in our case the employees would have been terminated at the earliest possible date it would have been lawful to do so. But this type of speculation is ridiculous. It is not a matter of speculation as to whether employment would have continued but is a matter of what rights were granted in the bargaining contract and that alone.

Moreover, we think it should be noted that in *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (CA 7, 1955), while the concept of limiting damages to the notice period was discussed, the principle underlying that rule was shown to have a broader basis than that now imputed by the Union. In that case it will be remembered the employee was unlawfully discharged under the terms of a collective bargaining contract. After the discharge, by agreement of the

Union and the employer, the contract was modified providing that employees could be terminated at a particular age with the right to remain for additional years with permission from the company. In determining damages for the employee, the court allowed recovery only on the basis that the employee would have worked to the earliest age and not the later. The rule which allows damages only for the notice period in those contracts providing for notice, was discussed and approved, to reveal that the true principle behind the rule is that damages for wrongful discharge are limited to the period ending with the earliest date on which the employer could lawfully discharge the employee.

The wrong in the case was not the failure to give notice but was a pure and simple act of wrongful discharge. It was recognized, as it was by the Court of Appeals below, that damages for wrongful discharge cannot continue beyond the date when the guarantee of job rights has expired because after such time the right of the employer to discharge the employee is unrestricted. Therefore, the Union's criticism of the Court's reliance on *United Protective Workers v. Ford Motor Co. and Odell v. Humble Oil & Refining Co.* is unveiled as being totally baseless. If we must resort to assumption as to the continuance or noncontinuance of employment on expiration of the contract, we reach the inevitable conclusion that the law assumes that the employment will not continue.

In *Eubanks v. Galveston, H. & S. A. Ry. Co.*, 59 S.W. 2d 825 (Tex. Com. App. 1933) a railway employee claimed wrongful discharge. The contract provided that if it should be determined by a board of adjustment that an employee had been wrongfully discharged he should be reinstated and

paid for time lost. The contract also stated that either party could withdraw from the contract at the end of a year by serving ninety days notice. The board found that the employee was wrongfully discharged. The railway company refused to abide by the decision of the board. Suit followed for damages based on the award and the trial court concluded as a matter of law that the employee was entitled to loss of pay for his life expectancy. The appellate court held that this was erroneous for the reason that the permissive termination clause in the contract prevented the contract from being one for life. In language which would seem tailor-made for our case the court said at 59 S.W. 2d 825, 827:

> "* * * we have absolutely no way of knowing how long the contract made the basis of this suit will be kept in operation, except for the current year, and the year following; where the time for notice has expired."

The court would not assume that the employment would have continued beyond the possible termination date of the contract. The same reasoning applies here.

In further pressing its point that it must be assumed that the eleven men involved in the arbitration would have continued to work beyond the expiration date of the contract, the Union relies upon *Western Union Division, Commercial Telegraphers, Commercial Telegraphers Union v. Western Union Telegraph Co.*, 83 NLRB 238 (1949). See Petitioner's Brief, 81. This Board decision, along with the decision in *National Labor Relations Board v. Victor Metal Products Corp.*, 106 NLRB 1361 (1935), was held by the Court of Appeals not to be controlling upon the basis that:

> "* * * The power of the National Labor Relations Board to formulate policies and prescribe disciplinary procedures to effectuate the purposes of the statute is not restricted by the terms of the contract between the employer and the union, as must be the case when either party to a labor agreement sues for specific performance or breach of contract under Sec. 301 of the statute. * * *" (Ent.R. 45).

In the *Western Union* decision the employer was specifically prohibited by the Merger Act from furloughing employees within four years of its merger with another telegraph company. The Board held that since the furlough occurred within the four-year statutory protection period, it could order reinstatement even though its decision was reached after the four year period had expired. The Board would not assume that the Company would have furloughed the employees immediately upon the expiration of the four-year period.

It must be noted in connection with this administrative decision that Congress entrusted the enforcement of employee rights under the Merger Act to the National Labor Relations Board and provided "the same remedies as are provided by the National Labor Relations Act in the case of employees covered by that act." Moreover, as the Board itself recognized

> "* * * the Merger Act imposed no time limitation upon the power of the Board to prescribe proper relief, and, except, perhaps, for the limitations contained in the National Labor Relations Act prior to amendment, places no limitation upon the nature of the

remedies. Thus, the Board is free to adopt those remedies within the framework of the National Labor Relations Act prior to amendment as it finds the situation merits."

The remedy for a wrongful discharge under the National Labor Relations Act is reinstatement and reimbursement for the loss of wages from date of wrongful discharge until the date of the offer of reinstatement. Consequently, the Merger Act provided the right as well as the remedy and the remedy extended the right of reinstatement specifically to such time as reinstatement was offered. The rights there, as the Court below pointed out, were purely statutory and did not involve contract law or contract principles as is the situation in the instant case.

We readily agree that the National Labor Relations Board may reinstate employees who have been wrongfully discharged because of some activity prohibited by the Act regardless of whether a contract of employment is in existence or has expired at the time reinstatement is ordered. This is so because such right is created by statute and the purpose of the Act could be easily thwarted if private contracts were allowed to prevail. Here we have no statutory prohibitions and the only rights available to the parties are those private rights created by contract law.

National Labor Relations Board v. Victor Metal Products Corp., 106 NLRB Rep. 1361 (1953) dismissed by the Court along with the *Western Union* case is also distinguishable from the instant situation on this basis. In that case the union had illegally discriminated against an employee so as to cause her discharge.

In ordering the union to make up her loss of wages, the fact that the union's collective bargaining contract had expired was held by the Board to be of no significance. This is entirely different from the case at hand because the employee's right arose directly out of the National Labor Relations Act and not from the contract, as here.

While the Union says that it cannot be assumed that employment would have terminated at the expiration of the contract, we might also add that there is no basis for assuming that it would not have terminated. However, there is no need here to indulge in such baseless speculation, for the law of contracts in order to impart certainty has provided, as we have seen, that damages can be received only until the termination date of the contract. It would be inconceivable that a man working under, say, a five-year employment contract and discharged without cause after three years, could recover damages not only for the two remaining years but also on into the future, ad infinitum. It is equally inconsonant with recognized principles to assert here that a fixed term employment contract can be extended indefinitely into the future.

In its discussion of the precedents applied by the Court of Appeals the Union has not once cited a court decision, federal or state, where the award of an arbitrator has been confirmed or where damages have otherwise been prescribed for any period continuing after the applicable agreement has been terminated. In trying to sustain its position the Union has relied upon an arbitrator's decision entitled *In Re Armour & Co. and United Packing House Workers of Local 15*, 11

L.A. 600 (1948). In the *Armour* decision there is not one authority cited by the arbitrator in support of his argument that reinstatement and back pay can be allowed after the contract expiration date. The decision makes the fallacious argument that if reinstatement and back pay is not so ordered, then redress of unwarranted discharge would be for naught. This overlooks the fact that the contract gives only so much redress as remains in time under the contract, that is to say if a day or hour remains of the contract, this is all the right to work that is left. For example, if a contract has one day to run and wrongful discharge occurs, the man is entitled to work one day to be made whole again. If the contract expires and all contract relationship ceases before he is made whole again, then he is entitled to one day's wages only. He would not, as the Union contends, be entitled to continue to work just as if the contract had not expired. The Union destroys the validity of its own argument on this point by admitting that after the contract had expired the Company could have reinstated the men and fired them immediately without cause. (Ent.R. 1a-22).

While not mentioned in its brief before this Court, the Union in the court below urged that *In Re Roto Supply Sales Co.*, 28 LA. 657 (N.Y.Sup.Ct. 1957) and *Lodge No. 12 IAM v. Cameron Iron Works*, 257 F.2d 467 (CA 5, 1958) also were authorities which upheld the award. *In Re Roto Supply Sales Co.* does not consider the scope of authority question, the facts being entirely different from those present in this case. The case merely holds that a dispute arising during the life of a contract may be arbitrated after termination, a proposition that is unquestioned by us. See page 42 above. The *Cameron Iron Works* case was claimed to have decided the question involved here without discussion. However, it appears from a reading of the case that the contract had not expired and that the renewal clause had been exercised to continue the contract life.

There are vital distinctions between the *Armour* award and the instant case. There, a new contract of employment became effective immediately on the termination date of the old and there was a continuing relationship that does not exist here. Moreover the arbitrator operated under a much broader wide-open-type arbitration clause.

Then too the weakness of the *Armour* argument is further highlighted by the arbitrator's startling assertion that he even had "power to order retroactive pay for a period prior to the effective date of the contract." See 11 A.L. 600, at 604. This in itself would seem to disregard all known concepts of contract law.

Here the collective bargaining contract did not create a permanent status, give indefinite tenure or extend rights created under the contract beyond its life. No court or arbitrator may remake that contract or impose additional liabilities not contemplated by the parties. The award of the arbitrator went beyond the contemplation of the parties as reflected in the contract. The arbitrator obviously exceeded the powers and the scope of his authority and the court below did not err.

III. The Decision Of The Court Of Appeals Does Not Conflict With The Decision Of The N.L.R.B. In Local No. 611, International Chemical Workers, And The Sixth Circuit Decision In N.L.R.B. v. Knight Morley Corporation, On Which Such Board Ruling Was Based, Or With The Policies Of The Federal Labor Laws.

The Union suggests that there is conflict between the Fourth Circuit Court's decision in this case and the

decisions reached in *Local No. 611, International Chemical Workers*, 123 N.L.R.B. No. 182, CCH Labor Law Reporter, Par. 56, 319 (1959) and N.L.R.B. v. *Knight Morley Corp.*, 251 F.2d 753 (CA 6, 1958). In the *Chemical Workers* case, it was held that a union unlawfully refused to bargain, by insisting as a prerequisite to reaching agreement on a new contract, that the employer bargain concerning the discharge of two employees and seven strikers. The old contract provided for the arbitration of grievances. The report of the decision which we have studied is not clear as to whether the union sought to negotiate the grievance of the seven strikers outside of the framework of the contract before it expired but it is clear that as to the two employees discharged, the Union, both before and after the old contract expired, sought to avoid the grievance procedure of the contract. The Board held that under the decision of the Sixth Circuit in the *Knight Morley* case, the contractual grievance procedure was the channel for the collective bargaining duty as to grievances which arose under the contract. Since the employer was not obligated to bargain as to such grievance, it was an unfair labor practice for the union to insist on making the grievance part of the negotiations.

In *Knight Morley*, the Sixth Circuit had followed its own decision in *Timken Roller Bearing Co. v. N.L.R.B.*, 161 F.2d 949 (CCA 6, 1947) and held that an employer did not commit an unfair labor practice by insisting that a grievance concerning discharge, arising before a contract had expired, should be handled through the grievance procedure of the expired contract rather than as a part of the negotiations for a new contract. The Union, in the case at hand, now imagines that the decision of the Court of Appeals,

when considered in view of the decisions in the *Chemical Workers* and *Knight Morley* cases, impales the Union on the horns of a dilemma which the union propounds as follows: "If it asks the employer to discuss the discharges outside the grievance procedure, the employer is free to refuse. If the Union insists to the point of deadlock, it is guilty of an unfair labor practice. If it invokes the grievance and arbitration procedure, the employer can, under the decision in the present case, refuse with impunity to comply with an award ordering reinstatement of the employees." (Petitioner's Brief, 74).

We point out that the Union's dilemma is imaginary. First, it is not so that there is absolutely no way in which the employer's wrong can be undone. The employees' injury has been remedied to the full extent of their contract rights in that they have been allowed actual monetary loss up to the expiration date of the contract. They were not entitled to reinstatement. Second, the Union's interpretation of the premise upon which the *Chemical Workers* and *Knight Morley* cases are based is a mistaken one.

The true basis for the holding in the *Chemical Workers* and *Knight Morley* cases is a belief in and a desire to support the sanctity of the collective bargaining contract. In those cases it was not a question of the appropriate way to gain reinstatement. The Sixth Circuit and the N.L.R.B. cannot, by even the most vivid imagination, be said to have held that reinstatement can be allowed even if the agreement has expired. Instead, it was a question as to whether the procedures for handling disputes incorporated in a contract derived from the collective bargaining process were to be honored. As is stated in *Timken Roller Bearing Co.*

v. N.L.R.B., 161 F.2d 949 at 955 (CCA 6, 1947), the case upon which *Knight Morley* was based:

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement. N.L.R.B. v. Reed & Prince Mfg. Co., 1 Cir., 118 F.2d 874. There is here no restriction in the contract on the obligation of the petitioner to bargain as in N.L.R.B. v. Highland Shoe Co., 1 Cir., 119 F.2d 218, and the petitioner sought not to curtail the process but to utilize the contractual mechanisms for its prosecution. The law invites, though it may not compel, a collective bargaining agreement. If adjudication bases no sanctions on commitments made therein by the bargaining agent, it imparts futility to a bargaining process hopefully developing in the interest of industrial peace. If the law penalizes one party to the contract for standing on a bargain not itself violative of law, there may still be compulsion to bargain, but the virtue of agreement vanishes. *It may well be that industry will concede much for a no-strike convenant and orderly grievance procedures. It may also result that it will concede little for promises, the performance of which may be insisted upon only at the risk of condemnation for unfair labor practices. The law, we think, does not compel such result.*" (Italics ours).

It will be seen that in the *Timken* and *Knight Morley* cases, the duty to collective bargain had been directed through a contractual agreement and the court was there concerned with the effect on future efforts at collective bargaining if the contract should be ignored. The sanctity of that contract was, therefore, protected in order to give substance to the collective bargaining process.

In this case the Court of Appeals has also sought to protect the contract rights of the parties by refusing to extend the employment contract beyond its stated term. There is no conflict between decisions. Even *Lincoln Mills*, which is heavily relied on by the union, is predicated on imparting validity to the collective bargaining contract by implementing the policy of Congress "which placed sanctions behind agreements to arbitrate grievance disputes ***." See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 at 456 (1957).

The Union further maintains that the decision might impede the operation of grievance and arbitration procedures under collective bargaining agreements by making it "advantageous for an employer to delay the settlement of grievances as long as possible, in the hope that by the time they reached arbitration the existing agreement will have expired and awards favorable to the union would not be enforceable." (Petitioner's Brief, 75).

This, of course, is a fallacy. It overlooks the fact that the grievants were granted their full contract rights when they were awarded back pay to the termination date of the contract. The Union conveniently forgets that the valid portion of the award will be enforced. In this case the Company is bound to pay several thousand dollars in back wages up until the time of the expiration date of the contract. Surely no employer is going to deliberately postpone settlement of just grievances until the contract has expired, while facing the possibility that thousands of dollars in damages are accruing against him during the period that the contract is still effective. If there is any danger at all that the claim is a valid one, the employer will by this economic pressure alone desire to dispose of the dispute as rapidly as possible.

The Union suggests that the possibilities it fears are illustrated by this case. It says that the only thing standing in the way of an agreement between the Company and the Union is the dispute of the eleven grievants involved here. There is nothing in the record which indicates the position of the Company, or the Union for that matter, on various terms of a new contract between the parties. There are many points of disagreement that would certainly hinder the formulation of a contract. Then, too, even without a contract, no great calamity has befallen those who have continued to work peacefully at higher wages than they had under the contract. (Ent.R. 2a-36.) And it might be remembered in this connection that the "no strike" agreement which the Union now feels is so essential to protection of the Company and the public did not prevent the original walkout for which the arbitrator himself meted out discipline to the participating employees. We suggest that much of the Union's alarm as to the national policy is engendered by the expediency of winning the case at hand.

The Union is advancing a theory of total judicial abnegation. It ignores that Section 301 of the Labor Relations Act, upon which the action in this case is based, was devised specifically to aid in giving a federal forum for suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting interstate commerce. The Court, in the instant case, has accorded the Union the full benefit of its contract and the Union and the eleven discharged men which it represents, cannot have more. The Union entered into a contract of one year's duration without provision for renewal. If greater and enlarged rights were desired they

should have been contracted for. As the Court of Appeals in its opinion has so clearly pointed out:

> "* * * Furthermore, the whole matter is subject to regulation by agreement between the parties which may provide for the continuation of the same contract terms in subsequent labor agreements curtailing the common-law right of the employer to discharge employees without cause. * * *" (Ent.R. 47).

This language adequately demonstrates that we are dealing only with rights under a particular contract and that the question presented is limited to this case. In the future it would be a simple matter to provide that the grievance provisions of the old contract would continue in effect while negotiations for a new contract are had.

Most collective bargaining contracts either provide for automatic renewal or else a new contract is negotiated prior to the expiration of the old. Here the Union failed to obtain a new contract either before or after the termination of the old one. And it asks that rights and privileges be granted just as if the old agreement had not been terminated or as if a similar new contract had come into existence. If the Union allows a contract to be terminated or does not provide for a contract of longer duration, or fails to provide for contingencies that might arise, it cannot complain that federal policy favoring arbitration is thwarted just because the contract has expired. To now ask that the contract be re-made actually runs counter to the free collective bargaining process of which the Union is such a staunch advocate.

IV. The Reasoning Of The Court Of Appeals Is Not Inconsistent With The Decision Of This Court In Vitarelli v. Seaton.

The Union maintains that the decision of the court in this case conflicts with the decision of the Supreme Court of the United States in *Vitarelli v. Seaton, Secretary of the Interior*, 359 U.S. 535, 79 S. Ct. 968 (1959). (Petitioner's Brief, 81). However, that case is not remotely similar to the instant case on the facts, does not involve a contract, and is permeated with policy considerations regarding procedural rights in security investigations within the administrative department of the national government.

The Union would interpret the result obtained in *Vitarelli* as enunciating a principle of general applicability to all employment to the effect that "when an employee is unlawfully discharged, the appropriate remedy is reinstatement with full back pay, even though his employer could subsequently have discharged him legally, so long as the employer in fact did not discharge him legally." (Petitioner's Brief 83). This is certainly an incorrect over-generalization and the case makes no such holding.

The rights of Vitarelli to reinstatement did not grow out of contract. His was a right established by federal administrative procedure. He was not protected in his tenure by an employment contract or by statute but he was protected by a departmental order of the Secretary of the Interior promulgating administrative rules and regulations prohibiting the discharge of an employee for security reasons unless certain prescribed procedures were observed involving specifi-

cation of charges, hearing, limitations as to competency and relevancy of evidence, and right to cross-examination.

Before the *Vitarelli* case was decided, it was well established that if dismissal from federal employment is based on a definite administrative procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed and followed. See *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152 (1957). If an attempt is made to discharge a governmental employee in violation of the rules of the administrative department in which he works, such discharge is without effect and his employment continues. Therefore, while the Secretary of the Interior had the right to summarily discharge Vitarelli without reason or cause, he could not do so once he had assigned the reason that national security was threatened by Vitarelli's continued employment. After security reasons were assigned for discharge, termination could be effectuated only after strict compliance with the rules and procedural standards promulgated by the Department of the Interior.

Nevertheless, the department failed to abide by its own rules and standards and Vitarelli's dismissal was of no effect because the charges were not specific, rules relating to relevancy and incompetency were not followed at the hearing, and right to cross-examine was refused. This is a far cry from the instant case where the rights of the eleven discharged men were established for only one year by a collective bargaining contract which was not renewed. In Vitarelli's case, his rights continued until lawfully terminated by the Secretary. They were not created or circumscribed by contract. They could only be terminated by the Secre-

tary and since he had not exercised his summary right to terminate, the employment continued.

Here in our case, the rights were created by the employment contract and ended when it terminated. The Supreme Court, in Vitarelli's case, was not dealing with employment rights created and governed by a collective bargaining contract nor did it purport to do so. It was not concerned with the principle that a collective bargaining contract does "not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute."

There is no conflict in decisions; nor is the reasoning of the Fourth Circuit inconsistent with *Vitarelli*. Here the rights were created and limited by contract. In *Vitarelli's* case, the right, or as it may better be called, the privilege, was preserved and guaranteed by established federal administrative law.

It is obvious that the Supreme Court was not attempting to formulate law as to private collective bargaining employment contracts. Its problem was one of a grave, recurring nature involving a continuing concern for the protection of individual rights and reputations in the loyalty and national security investigation field. Rather serious charges as to Vitarelli's loyalty were impugned and the hearing allotted him in some aspects approached that of an inquisition without the benefit of cross-examination. In the words of Justice Harlan, speaking for the majority at 359 U.S. 535, 542, 543:

> "* * * these indispensable indicia of a meaningful hearing were not observed. It is not an overcharacterization to say that as the hearing proceeded it developed into a wide-ranging inquisition into this man's educational, social, and political beliefs, encompassing even a question as to whether he was 'a religious man'."

As was said by Vitarelli himself, the action of the Secretary fastened a "badge of infamy" upon him which could only be removed by reinstatement.

If the court had permitted Vitarelli's discharge to have been upheld on the basis that the Secretary of the Interior could have, in any event, discharged him summarily without reason at any time even though he did not do so, the result would have been to completely undermine the established principle that administrative officers are bound by the procedures they themselves promulgate. Thus, in any loyalty or security cases where the employment was not protected by contract or statute, the administrator could label the employee a security risk, discharge him, deny a hearing provided for by departmental regulations, and then when the employee complained, say, "So what! I have the right to summarily discharge you in any event."

In such a situation the administrative rules and regulations would be circumvented with impunity, the employee being forced under a cloud of suspicion without the right to defend himself under rules intended to afford administrative procedural fair play. It is clear that the *Vitarelli* case has a limited application to its own peculiar factual circumstances and was not intended to pronounce law for general application to

private collective bargaining contracts. The decision there certainly is not in conflict with the decision in the case at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ENTERPRISE WHEEL AND CAR CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ENTERPRISE WHEEL AND CAR CORPORATION IN OPPOSITION

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OPINIONS BELOW

The citations for the opinions below have been presented in the Petition. The opinion of the Court of Appeals and the order modifying it also appear at pages 18 et seq. of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The United Steelworkers of America (hereinafter called the Union) requested arbitration when eleven employees were terminated on January 18, 1957, while working under the terms of a collective bargaining contract between the Union and Enterprise Wheel and Car Corporation (hereinafter referred to as the Company or as Enterprise). The Company denied that a grievance subject to arbitration existed. The collective bargaining contract

of one year's duration expired on April 4, 1957, and was not renewed nor was it succeeded by any subsequent agreement between the parties. Four months after the expiration of the contract the Union sued in District Court for specific performance of the contract, alleging jurisdiction under Section 301 (a) of the Labor Management Relations Act of 1947. Resort to the arbitration provisions of the contract were ordered and compliance was had.

The arbitrator on April 10, 1958, determined that while the employees were guilty of improper conduct, discharge was too severe. It was his decision that they should be reinstated with back pay running from date of discharge, beyond the contract termination date until reinstated, less credit to the Company for a disciplinary suspension period of ten days and less further undetermined amounts the men had received from other employment. The District Court ordered compliance with the decision and award of the arbitrator. The Court of Appeals modified the judgment below. It held that the award was invalid insofar as it ordered reinstatement and back pay beyond the termination date of the contract because the arbitrator had exceeded his authority under the contract. That Court also determined that the award was incomplete and ordered further arbitration as to the amounts earned or which should with diligence have been earned in other employment by the grievants.

While petitioner Union is at liberty to delineate the questions in its petition as it sees fit, the respondent Company does not agree that the questions presented by the Union are at issue in this case. When fairly stated the questions are as follows:

1. Whether that portion of the award of the arbitrator ordering reinstatement and back pay for the period after the termination date of the contract was invalid by reason of being in excess of the power and authority vested in the arbitrator under the terms, provisions and limitations of the contract entered into on April 5, 1956, and expiring on April 4, 1957.

2. Whether the Court of Appeals was correct in concluding that the arbitrator imperfectly executed his duties in failing to include in the award the specific amounts which had actually been earned or by the exercise of due diligence could have been earned by the grievants and in ordering that the arbitration be completed as to such amounts.

STATUTE INVOLVED

The pertinent statute, Section 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. Section 185 (a), has been set forth in the Petition at page 3.

STATEMENT

On April 5, 1956, Enterprise Wheel and Car Corporation and United Steelworkers of America entered into a collective bargaining agreement to be in force from April 5, 1956, until midnight on April 4, 1957. (R. 1a-18)[1]. Article III, Section 1, Step 4 of that contract regarding adjustment of grievances provided that in the event a disputed grievance could not be settled by the three step preliminary procedure, then

> "* * * it shall be submitted, at the request of either party, to a panel of three (3) members, one of whom shall be appointed by the Union, one by the Company, and the third member, who shall be an impartial umpire, shall be selected by mutual agreement of the parties. The expenses and salary incident to the services of the umpire shall be paid jointly by the Union and the Company. In the event that a mutually agreeable umpire cannot be selected within ten (10) days after date of notice of desire to appeal to 4th step grievance, either party may request the Federal Mediation and Conciliation Service to furnish the Company and the Union with a list of five (5) qualified and disinterested arbiters. The Company and the Union shall each reject two

[1] The same method of record reference will be used herein as that explained and followed in the Petition at page 1, footnote 1.

of the names thus submitted and the remaining person (or either of the remaining persons) shall be the third member of the panel. The decision of the umpire shall be final and binding on the parties." (R. 1a-16).

Article VIII of the contract recognized that the right to manage the plant and works and to direct the working forces was exclusively with the Company. However, Article IV, Section 1 limited this managerial right in the following manner:

"In the exercise of its rights and duties as set forth in ARTICLE VIII, Management agrees that a member of the Union shall not be peremptorily discharged from and after the date hereof, but that in all instances in which Management may conclude that an employee's conduct, may justify suspension or discharge, he shall be first suspended. Such initial suspension shall be for not more than five (5) work days. During this period of initial suspension the employee may, if he believes he has been unjustly dealt with, request a hearing and a statement of the offense before the Plant Manager with a member or members of the Grievance Committee present as he may choose. At such hearing, all the facts concerning the case shall be made available to both parties. After such hearing, Management shall conclude whether to convert the suspension into discharge, or extend, sustain, or revoke the suspension. If the suspension is revoked the employee shall be returned to employment and receive full compensation at his regular rate of pay for the time lost. If the suspension is sustained, extended, or converted into discharge, the employee may at any time within five (5) working days from the filing of Management's decision, allege and present a grievance to be handled in accordance with the procedure of ARTICLE III.

Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provi-

sions of this Agreement the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." (R. 1a-17, 18).

On January 18, 1957, the employment of eleven plant employees was terminated because they walked off their jobs by reason of the dispute of another employee with the Company. (R. 2a-19). The dispute of the fellow employee was forgotten, but the Union claimed that the eleven men who had been terminated had a grievance in accordance with the provision of the contract. The Company denied that a grievance existed, insisting that the men had quit, and refused to reemploy them. (R. 2a-20, 21). The answer of the Company refusing the reemployment was taken to be the result which would normally have been obtained in the third step of the grievance procedure outlined in Section 1 of Article III of the contract. The next step in such procedure, or Step 4, provided for arbitration procedure. On April 6, 1957, the Company refused to arbitrate. (R. 2a-9).

A charge of unfair labor practice was filed by the Union before the National Labor Relations Board on July 3, 1957. (R. 2a-10; also opinion of Court of Appeals, Petition, App. 20). The charge before the Board alleged a failure to collectively bargain and a violation of Section 8 (a) 3 of the National Labor Relations Act by reason of discrimination against the eleven men previously mentioned who had claimed that they were wrongfully discharged on January 18, 1957. The Board refused to issue a complaint and the charge was dismissed on August 12, 1957. (R. 2a-10).

Finally, on August 22, 1957, over four months after the collective bargaining contract had expired, the Union instituted an action in the United States District Court for the Southern District of West Virginia seeking specific performance of the labor contract, particularly the arbitration procedure of ARTICLE III, Section 1, Step 4 of the contract. (R. 2a-3; also opinion of Court of Appeals, Petition, App. 20).

The District Court ordered specific performance and pursuant to the Court's order the grievance was submitted under the terms of the contract, to Milton H. Schmidt, for arbitration, the parties agreeing to have only one umpire or arbitrator. (R. 2a-17). Hearing was held before him on January 3, 1958. (R. 2a-27). On April 10, 1958, he rendered what he denominated his "Decision and Award of the Arbitrator." His award is now set out:

"A W A R D

The grievance is allowed as follows:

1. The discharge of each of the grievants which occurred on January 18, 1957, is set aside and reduced to a disciplinary penalty of ten days suspension for each of the grievants. The ten day period is to be calculated from January 18, 1957.

2. The Company shall reinstate each of the grievants who desire reinstatement to the status of employees with their classifications and seniority status as of the date of their discharge, January 18, 1957.

3. The Company shall reimburse the grievants for all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension per ... and less such amounts as each has received for other employment since ten days after January 18, 1957.

/s/ Milton H. Schmidt

April 10, 1958" (R. 2a-23, 24).

As we have noted above, the controlling contract which outlined the arbitration procedure to be followed had expired and terminated on April 4, 1957. After that date all of the employees of the defendant who continued to work were without any contract whatsoever and the terms, conditions and rights of the terminated contract were not extended to embrace the period after April 4, 1957. (R. 1a-20; also admission of Union's Counsel, R. 1a-22). Nevertheless, the award of the arbitrator

granted reinstatement of the grievants and also back pay beyond the contract termination date at regular rates, less certain credits for a disciplinary suspension of ten days and less amounts received from other employment. No date was set upon which the reinstatement was to occur, nor was any finding made as to amounts secured in other employment. Neither was a formula provided for determining how amounts received from other employment were to be set off against the amount of money actually lost by reason of the grievants not working. Enterprise immediately asserted the award to be invalid. Yet this notwithstanding, after the award was made, Enterprise while refusing to reinstate the grievants, did offer to pay them, subject to offsets for earnings in other employment, at their regular rate of pay from the end of the ten day suspension period to April 4, 1957, the expiration date of the contract. This offer was refused. (R. 1a-21; 2a-39).

Then much later, on November 25, 1958, the Union filed a motion for Enterprise to show cause why it had not complied with the decision and award of the arbitrator, and also asked, if no good cause be shown, for aid in enforcement of the order of the District Court of October 21, 1957, requiring resort to the arbitration procedure of the contract.

Enterprise filed its answer and resistance to the motion to show cause, alleging that the District Court lacked jurisdiction for the reason that the plaintiff Union was seeking to enforce an arbitration award personal to individual grievants and that the original action ordering arbitration had been finalized when the grievance was submitted, the motion to show cause actually being a new action to enforce the award of the arbitrator. In the alternative, to the merits of the matter, Enterprise asserted that (a) the arbitrator had exceeded the powers vested in him under the terms and limitations of the collective-bargaining contract; (b) that the arbitrator had so imperfectly executed his duties that a final and definite award had not been made; and (c) that the award was not in accordance with law. (R. 2a-26, 27).

Defendant Enterprise further asserted that the collective bargaining contract entered into on April 5, 1956, for one year, had expired on April 4, 1957 and that after the expiration date no contract whatsoever was in effect and the contract had not been extended in any way. (R. 2a-28). The affidavit of Oscar Kraehenbuehl, president of the Company, was filed in support of the answer and resistance of the defendant. (R. 1a-20).

The motion to show cause was heard on December 11, 1958. (R. 2a-29). The Court ordered the defendant to show cause, to which action the defendant objected on the grounds of lack of jurisdiction, as asserted in its answer and resistance. Without waiver of objections as to jurisdiction, it was ordered that defendant's answer and resistance to the motion to show cause and the affidavit of Oscar Kraehenbuehl in support thereof be treated as the answer of the defendant, Enterprise, to the Court's order to show cause. The matter was then submitted on plaintiff's motion to show cause, the order of the Court for defendant to show cause in conformity with said motion, the defendant's answer and resistance thereto, the affidavit of Oscar Kraehenbuehl in support of the answer and resistance, and the facts agreed by the parties as shown in the pleadings, exhibits and admissions at the hearing. (R. 2a-29, 30). No testimony of witnesses was taken.

The District Court then held that the defendant Company had failed to show cause for its noncompliance with the decision and award of the arbitrator and rendered judgment on December 16, 1958, ordering forthwith compliance. To all of this defendant objected. (R. 1a-1, 2).

Timely appeal was taken from this judgment to the United States Court of Appeals for the Fourth Circuit. The issues on appeal presented by the appellant Company were as follows:

"I. Did the district court lack jurisdiction over the subject matter of the show cause proceeding for the reason that plaintiff Union sought

to enforce an arbitration award personal to individual grievants.

"II. Could plaintiff seek to enforce the award of the arbitrator by a motion to show cause under the order to arbitrate of October 21, 1957, since that was a final order which was complied with by submission of the grievance involved to arbitration.

"III. If the district court did not lack jurisdiction over the subject matter, should the decision and award of the arbitrator of April 10, 1958, be vacated as being illegal and void because

(A) the arbitrator exceeded the power vested in him under the terms, provisions and limitations of the contract entered into on April 5, 1956, expiring on April 4, 1957;

(B) the arbitrator by his award so imperfectly executed his duties that a final and definite award upon the matter submitted was not made; and

(C) the arbitration award is contrary to law." (Appellant's brief and appendix below 4, 5).

The Court of Appeals rejected the Company's contention that the District Court lacked jurisdiction over the subject matter of the suit because it was brought by the Union to enforce the personal rights of individual employees. The argument on this point was held not tenable under the decision in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1955).

However, the court determined that the award of the arbitrator exceeded the power vested in him and went beyond the scope of the arbitration agreement in ordering reinstatement and in ordering back pay for the period after the termination date of the contract. The Court concluded, on the basis of well settled authority, that

"**** collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute." (Opinion of Court of Appeals, Petition, App. 23).

In scrutinizing the contract the Court said:

"The rights which the employees derived from the 1956-57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time. *Meadows v. Radio Industries*, 7 Cir., 222 F.2d 347, 349; *Atchison T. & S. F. R. Co. v. Andrew*, 10 Cir., 211 F.2d 264, 265; *Warden v. Hinds*, 4 Cir., 163 F. 201; 35 Am. Jur., *Master & Servant*, Sec. 19 (pp. 457-58); American Law Institute Restatement, *Agency*, Sec. 442. The same principle is applied where a contract of employment contains a provision allowing termination after a period of notice has been given. In such cases damages for wrongful discharge are limited to the notice period since at the expiration of the period the right of the employer to discharge the employee is unrestricted. See *United Protective Workers v. Ford Motor Co.*, 7 Cir., 223 F. 2d 49, 52; *Odell v. Humble Oil & Refining Co.*, 10 Cir., 201 F.2d 123, 128, cert. den. 345 U. S. 941. It follows that in the pending case the discharged men had no right to damages for loss of time under the contract after its expiration and that the award should be amended so as to eliminate damages based on the subsequent period. This can easily be done without invalidating the entire award." (Opinion of Court of Appeals, Petition, App. 23, 24).

The Court, citing decisions of the Supreme Court, pointed out that the prevailing view is that even if

the award exceeds the scope of the arbitration agreement it is not invalid in toto but only so far as it is excessive, if it is of such character that a court can separate the part within from the part beyond the submission. (Opinion of Court of Appeals, Petition, App. 21, 22). In accordance with this concept the valid portion of the award was allowed to stand and the judgment of the District Court was modified so as to admit the requirement that the Company comply with the award of the arbitrator insofar as the award required the reinstatement of the discharged employees and the recovery of wages for loss of time was limited to the period of the contract.

The Court also found that the award was incomplete and indefinite because the arbitrator failed to include in the award the amounts which had actually been earned or by the exercise of due diligence could have been earned by the grievants in other employment. The Court showed that it has generally been held that a final award must be certain in its terms or provide means and data by which it may be made certain by mathematical calculation and that if it is deficient in this respect it must be vacated since the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. Nevertheless, it was felt that the rule forbidding the resubmission should not be applied in the settlement of employer-employee disputes. In consonance with the Supreme Court's direction in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957) that the federal courts fashion a federal substantive law in accordance with the national policy favoring arbitration, the Court ordered that the parties complete the arbitration so that the amounts due the grievants for loss of time could be definitely ascertained. (Opinion of the Court of Appeals, Petition, App. 24, 25).

The Union then filed a petition for rehearing advancing substantially the same reasons that it now urges upon this Court for granting certiorari. The petition for rehearing was denied.

ARGUMENT

I. There is no important question of federal law.

In a futile endeavor to create an important question for Supreme Court determination the petitioner Union asserts that the all-engrossing inquiry here is the extent to which a federal court may or should review the merits of an arbitrator's award when it is asked to enforce such award under Section 301 of the Labor Management Relations Act. (Petition 7). But this is a spurious issue. No such question is involved in this case and no amount of clever semantics will give it substance.

The Court of Appeals has not by any stretch of the imagination reviewed the merits of the controversy which was the subject matter of the arbitration. The principal question at issue was whether the arbitrator acted within the scope of his authority. The merits of the award were never considered. The Court of Appeals accurately applied uniformly accepted and long established principles of the law of arbitration. There was nothing new, startling, or controversial about the legal principles it applied. And there is no undetermined question of law present.

Nothing is better settled in federal or state law than that principle which holds that an arbitrator cannot go outside of the authority afforded him under the contract of submission. *United States v. Farragut*, 22 Wall. 406 (1874); *Arlington Towers Corp. v. John McShain*, 150 F.Supp. 904, 923 (DC D. C. 1957); *Texoma Natural Gas Co. v. Oil Workers International Union, Local 463*, 58 F.Supp. 132 (DC Tex. 1943), aff. 146 F.2d 62, cert. den. 324 U. S. 872, rehearing den. 325 U.S. 893; *Simmons v. Simmons*, 85 W. Va. 25, 100 S.E. 743 (1919). In 3 Am. Jur., *Arbitration and Award*, Sec. 41, it is pointed out that

> "* * * it is for the court, not the arbitrators, to decide whether the latter have exceeded their powers under the submission or have refused to

> exercise them, for since the submission is the foundation of the arbitrators' jurisdiction, their construction of it with respect to their own powers, unless clearly pursuant to its terms, is not conclusive."

State and federal common law decisions and decisions under the Federal Arbitration Act clearly buttress this conclusion and aptly demonstrate the universal lack of discord on the point.

In *Simmons v. Simmons*, 85 W. Va. 25, 100 S.E. 743, 746 (1919) it is stated that

> "* * * nothing is better settled in this state or elsewhere than that arbitrators cannot go outside of the order or contract of submission, and that their award beyond the submission, is absolutely void and of no effect. (Citations omitted)."

Similar law has been enunciated under the Federal Arbitration Act. Title 9 U.S.C. Judge Tamm speaking in *Arlington Towers Corp. v. John McShain*, 150 F Supp. 904, 923 (DC D.C. 1957) has held that

> "*Although the Arbitration Agreement specifically provides that the award of the Arbitrator shall be final and binding, that neither party will contest such findings and that neither party will appeal from any portion of the final judgment, there appears to be no doubt but that the plaintiffs are within their rights in challenging the Arbitration award, particularly on the grounds that the Arbitrator exceeded his authority* and upon the grounds of fraud, bias and prejudice." (Italics ours).

Again, under the Arbitration Act, in *Application of States Marine Corp. of Delaware*, 127 F. Supp. 943, 944 (DC N.Y. 1954) it was held that if arbitrators determine a matter not within the terms of the arbitration agreement

or fail to determine matters within the terms of such agreement, they have "exceeded or imperfectly executed their jurisdiction, and their award should be vacated."

In *Texoma Natural Gas Co. v. Oil Workers International Union, Local 463*, 58 F. Supp. 132, 146 (DC Tex. 1943), aff. 146 F. 2d 62, cert. denied 324 U.S. 872, rehearing denied 325 U.S. 893, it is pointed out:

> "* * * If the matters determined are not within the terms of the submission (i.e. within the arbitration provisions of the contract), or the arbitrators in making their award go beyond the contemplation of the parties, as reflected in the contract, they obviously exceed their jurisdiction and their award may be set aside in an appropriate proceeding."

Consequently, it is seen that the contract from which the arbitrator gains his authority circumscribes and delimits his activities to those matters and things which are within the scope of the contract.

Likewise, the Supreme Court, itself, long ago held that expressions in the submission agreement saying that the award shall be final and conclusive cannot operate to give effect to an award which does not conform to the submission. *United States v. Farragut*, 22 Wall. 406 (1874). Even the case of *Burchell v. Marsh*, 17 How. 344, 349 (1855) erroneously relied upon by the Union at page 8 of its Petition explicitly proclaims that the award must be within the submission in order to preclude court review.

The particular grievance involved in the arbitration now before the Court occurred on January 18, 1957. The bargaining contract under which arbitration was had, by its very terms was of one year's duration. (R. 1a-18). It expired on April 4, 1957 at midnight. It had no renewal clause and was not renewed. After April 4, 1957, there was no agreement of any kind between the company and the employees or their Union. (R. 1a-20, 21, 22).

With the termination of the contract, all job security rights ceased. Any employee continuing to work after the termination date could have been discharged with or without cause. The only protection afforded was that there could be no discrimination as defined under the Labor Management Relations Act and there is no question of any such discrimination in this case. Yet the arbitrator on April 10, 1958, long after the contract had expired, not only awarded back pay from discharge to the termination date but also awarded reinstatement and back pay beyond the termination date continuing until reinstatement was to occur.

Under the general law of arbitration the arbitrator exceeded his authority and by his award improperly modified and enlarged upon the provisions of the contract by erroneously granting the eleven grievants back pay and reinstatement beyond the contract period, on a theory that they had employment security rights continuing even beyond the expiration of the collective bargaining contract. (R. 2a-23). Since the contract had terminated at the time of arbitration, only monetary compensation for loss of pay from the date of discharge on January 18, 1957 to April 4, 1957, the termination date of the contract, could be awarded. All rights of the grievants arose from the contract and they were guaranteed protection from discharge without cause only until April 4, 1957.

The absence of an important question is further emphasized by the fact that the conclusion of the Court of Appeals that that portion of the award granting reinstatement and back pay for the period after the expiration of the contract was invalid is correct and is sustained by good authority.

It is beyond question that damages for wrongful discharge under a collective bargaining contract are limited to the period ending with the earliest date on which the employee could lawfully be discharged. See Williston On Contracts (1937 ed.) Sec. 1359, p. 3815; *United Protec-*

tive Workers Local No. 2 v. Ford Motor Co., 223 F.2d 49 (CA 7, 1955); *Odell v. Humble Oil & Refining Co.*, 201 F. 2d 123 (CA 10, 1953) and cases cited therein.

From this it will be seen that lost wages can only be awarded to the earliest possible date on which the contract could be legally terminated. In our case we find that the earliest possible date upon which the grievants could have been rightfully terminated, assuming good conduct on their part, was April 4, 1957, the expiration date of the contract. Therefore, loss of wages can run only until that date and there can be no reinstatement. It is manifest that no recovery could be had for damages for unlawful discharge arising after the termination date of the contract or after the date when the contract could have been effectively terminated by the employer.

It is well settled that collective bargaining agreements do not create a permanent status, give indefinite tenure or extend rights created and arising under the contract beyond its life when it has terminated. See *System Federation No. 59 v. Louisiana & A. Ry. Co.*, 119 F.2d 509, 515 (CCA 5, 1941), cert. den. 314 U.S. 656; *Elder v. N.Y.C. Ry. Co.*, 152 F.2d 361 (CA 6, 1945); *Cardenas v. Wilson & Co.*, 180 F.2d 828 (CA 10, 1950); *Shields v. Baltimore and Ohio Railroad Co.*, 154 F. Supp. 917, at 925 (DC Ind. 1957) and cases therein cited; *Walker v. Pennsylvania-Reading Seashore Lines*, 61 A.2d 453, 462 (NJ. 1948). The rights of the parties herein were fixed by the contract and ended when it ended. After its termination, those who remained in the employ of the defendant Enterprise or who were hired afterwards held no rights under the contract because it was not extended or renewed nor was there any other collective bargaining contract or agreement entered into between the Company and the plaintiff Union. (R. 1a-20; also admission of Union Counsel, R. 1a-22). The grievants, as has been pointed out in *System Federation No. 9 v. Louisiana & A. Ry. Co.*, 119 F.2d 509, 515 (CCA 5, 1941), cert. den. 314 U.S. 656.

> "* * * could not, because the contract had been breached as to them, claim that the breach had extended its life, so as to entitle them to time loss and to reinstatement after its abrogation."

Clearly then the Union has conjured a simulacrum. Not only has the Court of Appeals not invaded the arbitrators province, but it has made a correct decision. Moreover, the issue here is not related to the issues, real or imagined, by the Union in such cases as *United Steelworkers v. American Mfg. Co.*, No. 360 (certiorari granted November 9, 1959) and *United Steelworkers v. Warrior & Gulf Nav. Co.*, No. 443 (petition for certiorari pending) wherein arbitration has not yet occurred.

Actually the court below has shown the greatest possible deference to the arbitration process and has striven to uphold the award where it is legally possible to do so. Thus, only a portion of the award has been declared invalid, and the matter of compensation from other employment has been ordered to be resubmitted to arbitration so that the award can be made definite.

There is no question here important to the development of federal law relating to grievance arbitration because the issues of the case are resolved by well recognized and already existing principles.

The Union seems to be suggesting that merely because labor arbitration is concerned, a question for Supreme Court determination is present. If this be true it is difficult to see how the lower Federal Courts can ever be helpful in carrying out the direction of this Court in *Lincoln Mills* to fashion substantive federal law in keeping with national policy encouraging arbitration of industrial disputes. Such reasoning would completely emasculate these lower courts and require that every one of the myriad of litigated arbitration cases would ultimately have to be determined by this Court.

II. The decision of the Court below will not have a severe impact on grievance and arbitration procedures and does not frustrate the purposes and policies of the national labor law.

As a second reason for granting the writ, the union maintains that the decision might impede the operation of grievance and arbitration procedures under collective bargaining agreements by making it "advantageous for an employer to delay settlement of grievances as long as possible, in the hope that by the time they reached arbitration the existing agreement will have expired and awards favorable to the union would not be enforceable." (Petition 11).

This, of course, is a fallacy for it overlooks the fact that the grievants here were granted their full contract rights when they were awarded back pay to the termination date of the contract. The Union is advancing the revolutionary proposal that in a labor arbitration, the arbitrator should always have carte blanche regardless of the limitations and restrictions of the submission agreement. Arbitration can be useful in implementing collective bargaining, but if the courts are to abdicate all rightful authority as the Union asks, the development of the arbitration process will be seriously hampered and agreements to arbitrate will become few and far between.

The Union also ignores that Section 301 of the Labor Relations Act, upon which the action in this case is based, was devised specifically to aid in giving a federal forum for suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting interstate commerce. The Court, in the instant case, has accorded the Union the full benefit of its contract and the Union and the eleven discharged men which it represents, cannot have more. The Union entered into a contract of one year's duration without provision for renewal. If greater and enlarged rights were desired they should have been contracted for. As the Court of Appeals in its opinion has so clearly pointed out:

> "* * * Furthermore, the whole matter is subject to regulation by agreement between the parties which may provide for the continuation of the same contract terms in subsequent labor agreements curtailing the common-law right of the employer to discharge employees without cause." (Petition, App. 24).

This language adequately demonstrates that we are dealing only with rights under a particular contract and that the question presented is limited to this case. In the future it would be a simple matter to provide that the grievance provisions of the old contract would continue in effect while negotiations for a new contract are had.

Most collective bargaining contracts either provide for automatic renewal or else a new contract is negotiated prior to the expiration of the old. In either event the rights of the employee are regarded as continuing. Here the Union failed to obtain a new contract either before or after the termination of the old one. And it asks that rights and privileges be granted just as if the old agreement had not been terminated or as if a similar new contract had come into existence. If the Union allows a contract to be terminated or does not provide for a contract of longer duration, or fails to provide for contingencies that might arise, it cannot complain that federal policy favoring arbitration is thwarted just because the contract has expired.

The implications of the decision in this case are limited to the peculiar circumstances and to the particular contract under scrutiny. There is no frustration of the national labor policy, the policy of encouraging free collective bargaining being fortified rather than frustrated. It seems strange, indeed, that a union which is one of the leading advocates of free collective bargaining should ask that this Court now step in and totally remake a contract openly and fairly derived.

III. The decision of this Court does not conflict with the decision of the N.L.R.B. in Local No. 611, International Chemical Workers, and the Sixth Circuit decision in N.L.R.B. v. Knight Morley Corporation, on which such board ruling was based.

The Union suggests that there is conflict between the Fourth Circuit Court's decision in this case and the decisions reached in *Local No. 611, International Chemical Workers*, 123 N.L.R.B. No. 182, CCH Labor Law Reporter, Par. 56, 294 (1959) and *N.L.R.B. v. Knight Morley Corp.*, 251 F.2d 753 (CA 6, 1958). In the *Chemical Workers* case, it was held that a union unlawfully refused to bargain, by insisting as a prerequisite to reaching agreement on a new contract, that the employer bargain concerning the discharge of two employees and seven strikers. The old contract provided for the arbitration of grievances. The report of the decision which we have studied is not clear as to whether the union sought to negotiate the grievance of the seven strikers outside of the framework of the contract before it expired but it is clear that as to the two employees discharged, the Union, both before and after the old contract expired, sought to avoid the grievance procedure of the contract. The Board held that under the decision of the Sixth Circuit in the *Knight Morley* case, the contractual grievance procedure was the channel for the collective bargaining duty as to grievances which arose under the contract. Since the employer was not obligated to bargain as to such grievance, it was an unfair labor practice for the union to insist on making the grievance part of the negotiations.

In the *Knight Morley* case, the Sixth Circuit had followed its own decision in *Timken Roller Bearing Co. v. N.L.R.B.*, 161 F.2d 949 (CCA 6, 1947) and held that an employer did not commit an unfair labor practice by insisting that a grievance concerning discharge, arising before a contract had expired, should be handled through the grievance procedure of the expired contract rather

than as a part of the negotiations for a new contract. The Union, in the case at hand, now imagines that the decision of the Court of Appeals, when considered in view of the decisions in the *Chemical Workers* and *Knight Morley* cases, impales the Union on the horns of a dilemma which the union propounds as follows: The Union cannot gain reinstatement by arbitration because it cannot enforce the award, but to make reinstatement a condition of a labor contract would constitute an unfair labor practice. The Union says that this so-called dilemma results from the fact that "the Board and the Sixth Circuit say that the remedy is arbitration, not collective bargaining, and the Fourth Circuit says the remedy is collective bargaining, not arbitration." (Petition 13).

We point out that the Union's dilemma is imaginary. First, it is not so that there is absolutely no way in which the employer's wrong can be undone. The employees' injury has been remedied to the full extent of their contract rights in that they have been allowed actual monetary loss up to the expiration date of the contract. They were not entitled to reinstatement. Second, the Union's interpretation of the premise upon which the *Chemical Workers* and *Knight Morley* cases are based is a mistaken one.

The true basis for the holding in the *Chemical Workers* and *Knight Morley* cases is a belief in and a desire to support the sanctity of the collective bargaining contract. In those cases it was not a question of the appropriate way to gain reinstatement. The Sixth Circuit and the N.L.R.B. cannot, by even the most vivid imagination, be said to have held that reinstatement can be allowed even if the agreement has expired. Instead, it was a question as to whether the procedures for handling disputes incorporated in a contract derived from the collective bargaining process were to be honored. As is stated in *Timken Roller Bearing Co. v. N.L.R.B.*, 161 F.2d 949 at 955 (CCA 6, 1947), the case upon which *Knight Morley* was based:

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement. N.L.R.B. v. Reed & Prince Mfg. Co., 1 Cir., 118 F.2d 874. There is here no restriction in the contract on the obligation of the petitioner to bargain as in N.L.R.B. v. Highland Shoe Co., 1 Cir., 119 F.2d 218, and the petitioner sought not to curtail the process but to utilize the contractual mechanisms for its prosecution. The law invites, though it may not compel, a collective bargaining agreement. If adjudication bases no sanctions on commitments made therein by the bargaining agent, it imparts futility to a bargaining process hopefully developing in the interest of industrial peace. If the law penalizes one party to the contract for standing on a bargain not itself violative of law, there may still be compulsion to bargain, but the virtue of agreement vanishes. *It may well be that industry will concede much for a no-strike convenant and orderly grievance procedures. It may also result that it will concede little for promises, the performance of which may be insisted upon only at the risk of condemnation for unfair labor practices. The law, we think, does not compel such result.*" (Italics ours).

It will be seen that in the *Timken* and *Knight Morley* cases, the duty to collective bargain had been directed through a contractual agreement and the court was there concerned with the effect on future efforts at collective bargaining if the contract should be ignored. The sanctity of the contract was, therefore, protected in order to give substance to the collective bargaining process. Without such protection collective bargaining would be a hollow mockery.

In this case the Court of Appeals has also sought to protect the contract rights of the parties by refusing to extend the employment contract beyond its stated term. There is no conflict between decisions. E en *Lincoln Mills*, which is heavily relied on by the union, is predicated on imparting validity to the collective bargaining contract

by implementing the policy of Congress "which placed sanctions behind agreements to arbitrate grievance disputes ***." See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 at 456 (1957).

IV. The reasoning of the Court of Appeals is not inconsistent with the decision of this Court in Vitarelli v. Seaton, Secretary of the Interior.

The Union maintains that the decision of the court in this case conflicts with the decision of the Supreme Court of the United States in *Vitarelli v. Seaton, Secretary of the Interior*, 359 U.S. 535, 79 S. Ct., 968 (1959). (Petition 14). However, that case is not remotely similar to the instant case on the facts, does not involve a contract, and is permeated with policy considerations regarding procedural rights in security investigations within the administrative department of the national government.

The Union would interpret the result obtained in *Vitarelli* as enunciating a principle of general applicability to all employment to the effect that "when an employee is unlawfully discharged, the appropriate remedy is reinstatement with full back pay, even though his employer could subsequently have discharged him legally, so long as the employer in fact did not discharge him legally." (Petition 16). This is certainly an incorrect over-generalization and the case makes no such holding.

The rights of Vitarelli to reinstatement did not grow out of contract. His was a right established by federal administrative procedure. He was not protected in his tenure by an employment contract or by statute but he was protected by a departmental order of the Secretary of the Interior promulgating administrative rules and regulations prohibiting the discharge of an employee for security reasons unless certain prescribed procedures were observed involving specification of charges, hearing, limitations as to competency and relevancy of evidence, and right to cross-examination.

Before the *Vitarelli* case was decided, it was well established that if dismissal from federal employment is based on a definite administrative procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed and followed. See *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152 (1957). If an attempt is made to discharge a governmental employee in violation of the rules of the administrative department in which he works, such discharge is without effect and his employment continues. Therefore, while the Secretary of the Interior had the right to summarily discharge Vitarelli without reason or cause, he could not do so once he had assigned the reason that national security was threatened by Vitarelli's continued employment. After security reasons were assigned for discharge, termination could be effectuated only after strict compliance with the rules and procedural standards promulgated by the Department of the Interior.

Nevertheless, the department failed to abide by its own rules and standards and Vitarelli's dismissal was of no effect because the charges were not specific, rules relating to relevancy and incompetency were not followed at the hearing, and right to cross-examine was refused. This is a far cry from the instant case where the rights of the eleven discharged men were established for only one year by a collective bargaining contract which was not renewed. In Vitarelli's case, his rights continued until lawfully terminated by the Secretary. They were not created or circumscribed by contract. They could only be terminated by the Secretary and since he had not exercised his summary right to terminate, the employment continued.

Here in our case, the rights were created by the employment contract and ended when it terminated. The Supreme Court, in Vitarelli's case, was not dealing with employment rights created and governed by a collective bargaining contract nor did it purport to do so. It was not concerned with the principle that a collective bargaining contract does "not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its

life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute."

There is no conflict in decisions; nor is the reasoning of the Fourth Circuit inconsistent with *Vitarelli*. Here the rights were created and limited by contract. In *Vitarelli's* case, the right, or as it may better be called, the privilege, was preserved and guaranteed by established federal administrative law.

Moreover, it is obvious that the Supreme Court was not attempting to formulate law as to private collective bargaining employment contracts. Its problem was one of a grave reoccurring nature involving a continuing concern for the protection of individual rights and reputations in the loyalty and national security investigation field. Rather serious charges as to Vitarelli's loyalty were impugned and the hearing allotted him in some aspects approached that of an inquisition without the benefit of cross-examination. In the words of Justice Harlan, speaking for the majority at 359 U.S. 535, 79 S. Ct. 968, 974:

> "* * * these indispensable indicia of a meaningful hearing were not observed. It is not an over-characterization to say that as the hearing proceeded it developed into a wideranging inquisition into this man's educational, social, and political beliefs, encompassing even a question as to whether he was 'a religious man'."

As was said by Vitarelli himself, the action of the Secretary fastened a "badge of infamy" upon him which could only be removed by reinstatement.

If the court had permitted Vitarelli's discharge to have been upheld on the basis that the Secretary of the Interior could have, in any event, discharged him summarily without reason at any time even though he did not do so, the result would have been to completely undermine the established principle that administrative officers are bound by the procedures they themselves pro-

mulgate. Thus in any loyalty or security cases where the employment was not protected by contract or statute, the administrator could label the employee a security risk, discharge him, deny a hearing provided for by departmental regulations, and then when the employee complained, say, "so what! I have the right to summarily discharge you in any event."

In such a situation the administrative rules and regulations would be circumvented with impunity, the employee being forced under a cloud of suspicion without the right to defend himself under rules intended to afford administrative procedural fair play. It is clear that the Vitarelli case has a limited application to its own peculiar factual circumstances and was not intended to pronounce law for general application to private collective bargaining contracts. The decision there certainly is not in conflict with the decision in the case at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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December 15, 1959.

SUPREME COURT OF THE UNITED STATES

No. 538.—October Term, 1959.

United Steelworkers of America, Petitioner, v. Enterprise Wheel and Car Corp.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 20, 1960.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner union and respondent during the period relevant here had a collective bargaining agreement which provided that any differences "as to the meaning and application" of the agreement should be submitted to arbitration and that the arbitrator's decision "shall be final and binding on the parties." Special provisions were included concerning the suspension and discharge of employees. The agreement stated:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost."

The agreement also provided:

> ". . . It is understood and agreed that neither party will institute *civil suits or legal proceedings* against the other for alleged violation of any of the provisions of this labor contract; instead all disputes will be settled in the manner outlined in this Article III—Adjustment of Grievances."

A group of employees left their jobs in protest against the discharge of one employee. A union official advised them at once to return to work. An official of respondent at their request gave them permission and then rescinded it. The next day they were told they did not have a job any more "until this thing was settled one way or the other."

A grievance was filed; and when respondent finally refused to arbitrate, this suit was brought for specific enforcement of the arbitration provisions of the agreement. The District Court ordered arbitration. The arbitrator found that the discharge of the men was not justified, though their conduct, he said, was improper. In his view the facts warranted at most a suspension of the men for 10 days each. After their discharge and before the arbitration award the collective bargaining agreement had expired. The union, however, continued to represent the workers at the plant. The arbitrator rejected the contention that expiration of the agreement barred reinstatement of the employees. He held that the provision of the agreement above quoted imposed an unconditional obligation on the employer. He awarded reinstatement with back pay, minus pay for a 10-day suspension and such sums as these employees received from other employment.

Respondent refused to comply with the award. Petitioner moved the District Court for enforcement. The District Court directed respondent to comply. 168 F. Supp. 308. The Court of Appeals, while agreeing that the District Court had jurisdiction to enforce an arbitration award under a collective bargaining agreement,[1] held that the failure of the award to specify the amounts to be deducted from the back pay rendered the award unen-

[1] See *Textile Workers v. Cone Mills Corp.*, 268 F. 2d 920 (C. A. 4th Cir.).

forceable. That defect, it agreed, could be remedied by requiring the parties to complete the arbitration. It went on to hold, however, that an award for back pay subsequent to the date of termination of the collective bargaining agreement could not be enforced. It also held that the requirement for reinstatement of the discharged employees was likewise unenforceable because the collective agreement had expired. 269 F. 2d 327.

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *ante*, p. —, decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.[2]

[2] "Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. This is particularly true if, as in the steel industry, both tradition and technology have strongly and uniquely molded the ways men think and act when at work. The newly hired employee, the 'green hand,' is gradually initiated into what amounts to a miniature society. There he finds himself in a strange environment that assaults his senses with unusual sounds and smells and often with different 'weather conditions,' such as sudden drafts of heat, cold, or humidity. He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.

"Under the process in the old mills a very real 'miniature society' had grown up, and in important ways the technological revolution

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to

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described in this case history shattered it. But a new society or work community was born immediately, though for a long time it developed slowly. As the old society was strongly molded by the *discontinuous* process of making pipe, so was the new one molded by the *continuous* process and strongly influenced by the characteristics of new high-speed automatic equipment." Walker, Life in the Automatic Factory, 36 Harv. Bus. Rev. 111, 117.

enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions[3] free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. Moreover, we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration. It is not apparent that he went beyond the submission. The Court of Appeal's opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.

The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United States Steel-*

[3] See Jalet, Judicial Review of Arbitration: The Judicial Attitude, 45 Cornell L. Q. 519, 522.

workers of America v. *American Manufacturing Co., ante*, p. —, decided this day. As we there emphasized the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

We agree with the Court of Appeals that the judgment of the District Court should be modified so that the amounts due the employees may be definitely determined by arbitration. In all other respects we think the judgment of the District Court should be affirmed. Accordingly, we reverse the judgment of the Court of Appeals, except for that modification, and remand the case to the District Court for proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 538.—October Term, 1959.

United Steelworkers of America, Petitioner, v. Enterprise Wheel and Car Corp.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 20, 1960.]

Mr. Justice Whittaker, dissenting.

Claiming that the employer's discharge on January 18, 1957, of 11 employees violated the provisions of its collective bargaining contract with the employer—covering the period beginning April 5, 1956, and ending April 5, 1957—the union sought and obtained arbitration, under the provisions of the contract, of the issues whether these employees had been discharged in violation of the agreement and, if so, should be ordered reinstated and awarded wages from the time of their wrongful discharge. In August 1957 more than four months after the collective agreement had expired, these issues were tried before and submitted to a Board of Arbitrators. On April 10, 1958, the arbitrators made their award, finding that the 11 employees had been discharged in violation of the agreement and ordering their reinstatement with back pay at their regular rates from a time 10 days after their discharge to the time of reinstatement. Over the employer's objection that the collective agreement and the submission under it did not authorize nor empower the arbitrators to award reinstatement or wages for any period after the date of expiration of the contract (April 5, 1957), the District Court ordered enforcement of the award. The Court of Appeals modified the judgment by eliminating the requirement that the employer reinstate the employees and pay them wages for the period *after* expira-

tion of the collective agreement, and affirmed it in all other respects, 269 F. 2d 327, and we granted certiorari, 361 U. S. 929.

That the propriety of the discharges, under the collective agreement, was arbitrable under the provisions of that agreement, even after its expiration, is not in issue. Nor is there any issue here as to the power of the arbitrators to award reinstatement status and back pay to the discharged employees to the date of expiration of the collective agreement. It is conceded, too, that the collective agreement expired by its terms on April 5, 1957, and was never extended or renewed.

The sole question here is whether the arbitrators exceeded the submission and their powers in awarding reinstatement and back pay for any period after expiration of the collective agreements. Like the Court of Appeals, I think they did. I find nothing in the collective agreement that purports to so authorize. Nor does the Court point to anything in the agreement that purports to do so. Indeed, the union does not contend that there is any such covenant in the contract. Doubtless all rights that accrued to the employees under the collective agreement during its term, and that were made arbitrable by its provisions, could be awarded to them by the arbitrators, even though the period of the agreement had ended. But surely no rights *accrued* to the employees under the agreement after it had expired. Save for the provisions of the collective agreement, and in the absence, as here, of any applicable rule of law or contrary covenant between the employer and the employees, the employer had the legal right to discharge the employees at will. The collective agreement, however, protected them against discharge, for specified reasons, during its continuation. But when that agreement expired, it did not continue to afford rights *in futuro* to the employees—as though still effective and governing. After the agreement

expired the employment status of these 11 employees was terminable at the will of the employer, as the Court of Appeals quite properly held, 269 F. 2d, at 331, and see *Meadows v. Radio Industries*, 222 F. 2d 347, 349 (C. A. 7th Cir.); *Atchison, T. & S. F. R. Co. v. Andrews*, 211 F. 2d 264, 265 (C. A. 10th Cir.); *Warden v. Hinds*, 163 F. 201 (C. A. 4th Cir.), and the announced discharge of these 11 employees then became lawfully effective.

Once the contract expired, no rights continued to accrue under it to the employees. Thereafter they had no contractual right to demand that the employer continue to employ them, and *a fortiori* the arbitrators did not have power to order the employer to do so; nor did the arbitrators have power to order the employer to pay wages to them after the date of termination of the contract, which was also the effective date of their discharges.

The judgment of the Court of Appeals, affirming so much of the award as required reinstatement of the 11 employees to employment status and payment of their wages until expiration of the contract but not thereafter, seems to me to be indubitably correct, and I would affirm it.